IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: THE DEPARTMENT OF ENERGY
STRIPPER WELL EXEMPTION LITIGATION} M.D.L. No. 378

FINAL SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

Page[1]

I. PARTIES 14a
A. DOE 14a
B. States 14a
C. Refiners 14a
D. Resellers 14a
E. Retailers 15a
F. Airlines 15a
G. Agricultural Cooperative 15a
H. Surface Transporters 15a
I. Utilities 16a
II. M.D.L. 378 ..... 16a
A. Settlement 16a
1. Approval of Agreement 16a
2. Cooperation on Discovery 17a
3. Cooperation on Other Issues 17a
4. Waiver of Civil Penalties 17a
5. Dismissal of Litigation 17a
6. Remaining Issues 18a
B. Distribution of Funds 18a
1. Initial Distribution 18a

[1] Original page numbers have been adjusted to reflect the pagination of the Final Settlement Agreement as reproduced in this Appendix.

Page

a. Segregation of Initial Accounts 18a

b. Distribution of Initial Accounts 19a

c. Interest 19a

2. Distributions to Non-Government Parties 20a

a. Refiners 20a

b. Resellers 20a

i. Initial Distribution 20a

ii. Second Distribution 21a

c. Retailers 21a

i. Initial Distribution 21a

ii. Second Distribution 22a

d. Airlines 22a

i. Initial Distribution 22a

ii. Second Distribution 23a

e. Agricultural Co-ops 23a

i. Initial Distribution 23a

ii. Second Distribution 24a

iii. Indemnification 24a

iv. Reserve 24a

f. Surface Transporters 25a

g. Utilities 25a

h. Conditions Applicable to Second Distributions 25a

3. Distributions to DOE and the States 27a

a. DOE/States Available Fund Disbursement .. 27a

Page

b. DOE/States Incremental Fund Disbursement 27a
c. Advance Fund 27a
d. Funding of Second Distributions 28a
e. Assurance Fund 29a
f. State Use of Funds 29a
i. Public Notice 30a
ii. Restitutionary Program 31a
iii. Administrative Expenses 32a
iv. Reporting of Expenditures 33a
g. DOE Funds 33a
C. The Set Aside 33a
1. Pending Litigation 33a
2. Escrow Set Aside 34a
3. Future Set Asides 34a
III. WAIVERS, RELEASES AND EXCLUSIONS 35a
A. Waivers and Releases 35a
1. Release of Claims to Crude Oil Funds 35a
2. Refiners Release 35a
3. Other Releases 35a
4. Certain Claims Reserved 36a
5. Section 210 Claims 36a
6. Amoco 37a

Page

7. Consumers Power 37a

B. Exclusions 38a

1. *DOE v. Hunt* 38a

2. *Diamond Shamrock* 38a

3. *Citronelle* 38a

4. *Gulf/Cities* 39a

5. *Ashland* 39a

6. *Getty/Sohio* 39a

7. Other Funds Not Affected 40a

8. *Hawkins Field* 40a

9. Department of Interior 41a

10. Tertiary Incentive Claims 41a

IV. OTHER ALLEGED CRUDE OIL VIOLATIONS PROCEEDINGS 41a

A. Pending and Future DOE Actions 41a

1. Pending DOE Actions 41a

2. Future DOE Actions 42a

B. Pending and Future Proceedings 42a

1. Modification of Policy 42a

2. Distribution of Future Funds 43a

a. Application of Policy 43a

b. Payment Mechanism 44a

3. Modification of DOE Order 45a

4. Expeditious Issuance of Orders 45a

Page

5. Modification of PRO's, etc. 46a
6. Future Subpart V Proceedings 46a
7. Disbursement of OHA Funds 47a
8. Implementation in Other Cases 48a
9. Future Policy 48a

V. ENTITLEMENTS LITIGATION 49a
A. Payments of Entitlements Settlement Funds ... 49a
B. Vacation of Entitlements Judgment 50a
C. Acceptance of Funds 50a
D. Buyers Relinquishment of Claims 50a
E. Withdrawal of Other Entitlements Litigation .. 51a
F. Termination of Entitlements Actions by DOE 52a
G. Preservation of Entitlements Claims 52a
H. Entitlements Settlement Contingency 53a

VI. MISCELLANEOUS 53a
A. Agreement Binding 53a
B. Support of Agreement 54a
C. Non-Crude Oil Cases 55a
D. Ongoing Formula 55a
E. Standing 55a
F. No Prejudice 56a
G. Captions 56a
H. Counterparts 56a

Page

EXHIBITS TO SETTLEMENT AGREEMENT[2]

SETTLEMENT EXHIBIT A: Refiners Escrow Agreement

Refiners Escrow Attachment A: Release of Claims

Refiners Escrow Attachment B: Eligible Seller Recipients

Refiners Escrow Attachment C: Sellers Unpaid Entitlements Amount

Refiners Escrow Attachment D: Eligible Buyer Recipients

Refiners Escrow Attachment E: Eligible General Recipients

SETTLEMENT EXHIBIT B: Order Establishing Resellers Escrow and Prescribing Provisions for Administration of the Resellers Fund

Resellers Escrow Attachment A: Notice of Settlement

Resellers Escrow Attachment B: Notice of Settlement and Distribution of Settlement Amount

Resellers Escrow Attachment C: Reseller Verified Claim Form and Waiver

[2] Exhibits to the Final Settlement Agreement are not reproduced in this Appendix.

Page

SETTLEMENT EXHIBIT C: Order Approving Independent Retailers of Motor Fuels Group Administration and Trust Agreement

Retailers Escrow Attachment A: Notice of Settlement

Retailers Escrow Attachment B: Notice of Settlement and Distribution of Settlement Amounts and Claim Form and Release

Retailers Escrow Attachment B (continued): Claim Form and Release

SETTLEMENT EXHIBIT D: Order Establishing Airlines Escrow and Prescribing Escrow Instructions

Airlines Escrow Attachment A: Airlines Escrow Settlement Claim Form and Waiver

SETTLEMENT EXHIBIT E: Order Establishing Agricultural Cooperatives Fund and Setting Forth Provisions for the Administration and Distribution of the Fund

Cooperatives Order Attachment A: List of Eligible Cooperatives

Cooperatives Order Attachment B: Notice to Eligible Cooperatives of Settlement and Distribution of Agricultural Cooperatives Fund

Cooperatives Order Attachment C: Claim Form

Cooperatives Order Attachment D: Cooperative Waiver, Release and Other Conditions of Disbursement

Page

Cooperatives Order Attachment E: Notice to Agricultural Cooperatives Who May Petition the Court for a Determination of Eligibility

SETTLEMENT EXHIBIT F: Order Establishing Surface Transporters Escrow and Prescribing Provision for Administration of the Fund

Surface Transporters Attachment A: Surface Transporters Escrow Settlement Claim Form and Waiver

SETTLEMENT EXHIBIT G: Order Establishing Utilities Escrow and Prescribing Provisions for Administration of the Fund

Utilities Escrow Attachment A: Utilities Escrow Settlement Claim Form and Waiver and Release

SETTLEMENT EXHIBIT H: Calculation of Ratios for Distribution to States and Territories - M.D.L. 378

SETTLEMENT EXHIBIT I: Letter of Assurance

SETTLEMENT EXHIBIT J: Examples of DOE Approved State Restitutionary Programs

SETTLEMENT EXHIBIT K: Cases Involving Alleged Crude Oil Violations

SETTLEMENT APPENDIX I: May 5th Settlement Agreement

SETTLEMENT APPENDIX 2: May 5th Supplemental Agreement

INDEX TO DEFINED TERMS

	Page[3]
Advance Fund	27a
Affiliate	53a
Agreement	13a
Airlines	15a
Airlines Excess Funds	22a
Airlines Initial Distribution	22a
Airlines Order	22a
Airlines Second Distribution	23a
Alleged Crude Oil Violations	13a
Approval Order	18a
Assurance Fund	29a
Attachment C Releases	49a
Attorney General	30a
Available Fund	27a
Control	53a
Co-ops	15a
Co-ops Excess Funds	23a
Co-ops Initial Distribution	23a
Co-ops Order	23a
Co-ops Second Distribution	24a

[3] Original page numbers have been adjusted to reflect the pagination of the Final Settlement Agreement as reproduced in this Appendix.

Page

Co-ops Second Distribution 24a
District Court 16a
DOE 14a
DOE Amoco/Stripper Fund 16a
Entitlements Disbursement 49a
Entitlements Programs 13a
ERA 14a
ESA 33a
Final Approval 49a
Final Court Approval 19a
Incremental Fund 27a
Indemnification 24a
M.D.L. 378 ..... 13a
M.D.L. 378 Escrow 16a
Modified Policy 43a
OHA 14a
Parties 14a
Payment Date 19a
Person 14a
Refiners 14a
Refiners Distribution 20a
Refiners Release 35a
Resellers 14a
Resellers Excess Fund 20a
Resellers Initial Distribution 20a

Page

Resellers Order 20a
Resellers Second Distribution 21a
Reserve 24a
Retailers 15a
Retailers Excess Funds 21a
Retailers Initial Distribution 21a
Retailers Order 21a
Retailers Second Distribution 22a
Settlement Period 15a
States 14a
Surface Transporters 15a
Texaco v. DOE 50a
Total Fund 20a
Utilities 16a

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter this Agreement) is entered into as of the 5th day of May, 1986 between the United States Department of Energy (hereinafter DOE), the States, the Refiners, the Resellers, the Retailers, the Airlines, the Agricultural Cooperatives, the Surface Transporters, the Utilities (as defined hereinafter), and others who become signatories hereto.

WITNESSETH THAT:

WHEREAS, certain parties have been engaged for several years in complex and protracted litigation, entitled *In Re Department of Energy Stripper Well Exemption Litigation* (hereinafter M.D.L. 378);

WHEREAS, certain parties are or will be involved in other proceedings, both judicial and administrative, involving alleged violations of DOE's price and allocation controls applicable to crude oil (hereinafter the Alleged Crude Oil Violations) including but not limited to: (1) the first sale and the resale of crude oil under 10 C.F.R. Part 212, Subparts D, F, and L and (2) the Domestic Crude Oil Allocation Program (hereinafter the Entitlements Program);

WHEREAS, these violations may have had an effect on the Entitlements Program which affected all participants in that Program and thereafter all purchasers of refined petroleum products, or otherwise may have had effects on such purchasers;

WHEREAS, certain parties have been engaged for several years in complex and protracted litigation involving the conclusion of the Entitlements Program administered by DOE;

WHEREAS, the parties desire to compromise and settle certain pending lawsuits and other proceedings, as well as avoid future controversy, by establishing a mutually agreeable

method of disbursing certain funds that have been or will be collected as a result of the alleged violations in issue; and

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein the parties agree as follows:

I. PARTIES

The parties to this Agreement are those Persons, including any individual, firm, corporation, partnership, joint stock company, joint venture, business trust, cooperative, voluntary association, or government or department thereof (herein called a Person), who are or who become signatories to or bound by this Agreement and their predecessors, successors and assigns (hereinafter the Parties). The Parties and recipients of monies pursuant to this Agreement include:

A. *DOE.* DOE is the United States Department of Energy, including the Economic Regulatory Administration (hereinafter the ERA) and the Office of Hearings and Appeals (hereinafter the OHA).

B. *States.* The States include the fifty sovereign States of the United States, the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of American Samoa, Guam, the Northern Marianas, and the U.S. Virgin Islands on behalf of themselves and their citizens.

C. *Refiners.* The Refiners include all participants in the Entitlements Program based on actual or deemed runs-to-stills, which are identified in DOE's draft Entitlements Adjustment Notice published in the Federal Register on November 3, 1983, 48 *Fed. Reg.* 50824.

D. *Resellers.* The Resellers include all marketers and distributors of domestically refined petroleum products during any part of the period

August 19, 1973 through January 27, 1981 (hereinafter the Settlement Period) with the exception of the groups which are specifically excluded in the Resellers Order referenced below.

E. *Retailers*. The Retailers include all independent marketers of domestically-refined motor fuels (branded and unbranded gasoline and diesel fuels) who made 50 percent or more of their sales at retail during any part of the Settlement Period, with the exception of those specifically excluded in the Retailers Order referenced below.

F. *Airlines*. The Airlines include all United States-certified air carriers holding a certificate issued pursuant to 49 U.S.C. § 1371 and purchasing domestically-refined kerosene jet fuel during any part of the Settlement Period.

G. *Agricultural Cooperatives*. Subject to the provisions of the Cooperatives Order referenced below, the Agricultural Cooperatives (hereinafter the Co-ops) include all national, regional and inter-regional "cooperative associations" and "cooperatives" (under 12 U.S.C. § 1141j or any state agricultural marketing or association law), including and acting on behalf and for the mutual benefit of all their member-patrons, which Co-ops (1) were engaged in refining or resale of petroleum products to their own member-patrons during any part of the Settlement Period, and (2) presently operate and actively transact business with or for member-patrons on a cooperative basis.

H. *Surface Transporters*. The Surface Transporters include all commercial motor vehicle surface transporters of persons or property including "for hire" carriage and private fleet transportation, regulated and unregulated, and specifically including,

without limitation, trucks, buses and taxicabs, who utilized oil products in such operation at any time during the Settlement Period.

I. *Utilities.* The Utilities include all investor-owned electric utilities utilizing oil or oil products in the generation of electricity at any time during the Settlement Period with the exception set forth in the Utilities Order. Neither cooperatively owned nor governmentally owned utilities are included as Utilities.

II. M.D.L. 378

A. Settlement.

1. *Approval of Agreement.* By execution of or becoming Parties to this Agreement, and subject to Paragraph VI.F, the Parties intend to compromise and settle all claims to the funds in escrow in M.D.L. 378 and any additional funds which are subsequently deposited therein (hereinafter the M.D.L. 378 Escrow), and the funds attributable to injection well issues which were paid by Amoco to DOE on February 1, 1985, in compliance with the February 14, 1980 Amoco consent order, plus interest accrued through the date of disbursement pursuant to this Agreement (hereinafter the DOE/Amoco Stripper Fund). The Parties agree to use their best efforts to obtain approval of this Agreement by the U.S. District Court for the District of Kansas (hereinafter the District Court) and distribution of the M.D.L. 378 Escrow in accordance with this Agreement as expeditiously as possible. A Party who is not otherwise a party to M.D.L. 378 shall not become or be considered a party to M.D.L. 378 by reason of having executed this Agreement nor shall execution hereof be probative of making any Party a party to M.D.L. 378, although all Parties are bound by the terms of this Agreement and agree to be bound by an order of the District Court approving and enforcing the Agreement.

2. *Cooperation on Discovery.* The Parties recognize that there are certain remaining unresolved discovery matters in M.D.L. 378. The Refiners agree to cooperate with DOE in resolving these issues as expeditiously as possible and to facilitate the production of documents and answers to interrogatories to the greatest extent practicable without waiving any substantive rights or claims of privilege which any Refiner may have.

3. *Cooperation on Other Issues.* The Refiners which are or which become parties to M.D.L. 378 agree to cooperate with DOE in obtaining speedy judicial resolution of any liability issues remaining in the litigation. Each Refiner which is or which becomes a party to M.D.L. 378 agrees to pay into the M.D.L. 378 Escrow, within 30 days after the Payment Date as hereinafter defined within 30 days after becoming a party, or within 30 days after a demand for payment by DOE, whichever is later, any monies or portions of monies being held by it which DOE claims should be paid into the M.D.L. 378 Escrow which claims or portions of claims are no longer contested in good faith by such Refiner.

4. *Waiver of Civil Penalties.* DOE agrees to waive and release any claim for civil penalties against any of the Parties arising out of, or relating to, counting injection wells to qualify a property as a stripper property.

5. *Dismissal of Litigation.* Upon District Court approval of this Agreement, and the occurrence of the Payment Date as hereinafter defined, each of the cases making up M.D.L. 378 will be dismissed with prejudice individually when all remaining issues concerning any alleged monetary liability are finally resolved in that particular case and all money owed in that case has been paid into the M.D.L. 378 Escrow. DOE agrees not to assert against a Party whose case has been dismissed under this paragraph any additional claim arising out of, or relating to, counting injection wells to

qualify a property as a stripper well property for the same production and time period covered by the dismissed case. Each of the Parties agrees to bear its own costs incurred in the prosecution or defense of M.D.L. 378 litigation.

6. *Remaining Issues.* Nothing in this Agreement may be read to enlarge, abridge, limit or otherwise affect the ability of the parties to M.D.L. 378 to litigate the issues remaining in M.D.L. 378 concerning the determination and collection of the amount of remaining liability, if any, of any party to M.D.L. 378 for counting injection wells to qualify a property as a stripper well property, or to seek the imposition of sanctions for failure to comply with proper discovery requests.

B. Distribution of Funds.

1. *Initial Distribution.*

a. *Segregation of Initial Accounts.* Upon District Court approval of this Agreement (hereinafter the Approval Order), funds in the M.D.L. 378 Escrow shall be segregated into the following Accounts in the amounts specified in the following paragraphs of this Agreement:

i.	Refiners Amount	II.B.2.a.
ii.	Resellers Account	II.B.2.b.i.
iii.	Retailers Account	II.B.2.c.i
iv.	Airlines Account	II.B.2.d.i
v.	Co-ops Account	II.B.2.e.i
vi.	Surface Transporters Account	II.B.2.f
vii.	Utilities Account	II.B.2.g
viii.	States Account	II.B.3
ix.	DOE Account	II.B.3

b. *Distribution of Initial Accounts.* Distribution of funds from Accounts i through ix above, including interest as provided in Paragraph II.B.1.c, to the respective Parties, or to their Escrows (as hereinafter provided) for further distribution in accordance therewith, shall proceed, subject to District Court approval, upon the earliest date provided below:

i. if no opposition to this Agreement is filed with the District Court, as soon as that court may permit;

ii. if no appeal is taken from the Approval Order, upon expiration of the time for appeal;

iii. if an appeal is taken from the Approval Order which solely concerns the process or procedural mechanism for payments of funds in one or more of the Accounts i through ix above, or a determination of eligibility for payment to a party who claims that it is eligible under the terms of this Agreement for payment from such Account(s), or respective Escrow(s), as soon as the District Court may permit, except to the extent distribution of some or all of the funds in the Account(s) or Escrow(s) which is the subject of such appeal(s) is stayed pending appeal; or

iv. if not earlier distributed, upon a final judgment or order approving this Agreement which judgment or order is not subject to further appellate review (hereinafter Final Court Approval).

The date on which funds are distributed to all of the Parties or their Escrows, except any Party or Escrow as may be subject to a stay as described in (iii) above, shall hereinafter be referred to as the Payment Date.

c. *Interest.* A proportionate share of any earnings of the M.D.L. 378 Escrow shall accrue to the benefit

of, and be included in, each Account segregated under Paragraph II.B.1 effective from the date of the Approval Order until the date of disbursement of that Account as provided under this Agreement.

2. *Distributions to Non-Governmental Parties.*

a. *Refiners.* The amount of $298,514,000 (hereinafter the Refiners Distribution shall be segregated pursuant to Paragraph II.B.1.a, into the Refiners Account for disbursal, pursuant to Paragraph II.B.1.b, to the Refiners Escrow Agent for further distribution in accordance with the Refiners Escrow Agreement (attached hereto as Exhibit A).

b. *Resellers.*

i. *Initial Distribution.* The amount of $44,690,371 shall be segregated, pursuant to Paragraph II.B.1.a, into the Resellers Account for disbursal, pursuant to Paragraph II.B.1.b, to the Resellers Escrow (hereinafter the Resellers Initial Distribution) for further distribution pursuant to the Order Establishing Resellers Escrow and Prescribing Provisions for Administration of the Fund (hereinafter the Resellers Order attached as Exhibit B). In the event the total amount in the M.D.L. 378 Escrow and the DOE/Amoco Stripper Fund, irrespective of any funds set aside pursuant to Paragraph II.C (hereinafter the Total Fund), is less than $1.433 billion at the time of the Approval Order, then 2.25 percent of the difference between $1.433 billion and the Total Fund shall be deducted from the Resellers Initial Distribution. In the event the Total Fund exceeds $1.433 billion on the date of the Approval Order, then 2.25 percent of the amount by which the Total Fund exceeds $1.433 billion, plus interest thereon, not to exceed $13,790,323 (hereinafter the Resellers Excess Fund), shall be segregated for disbursal to the Resellers Escrow on the first anniversary of the Resellers Initial

Distribution and shall not be disbursed to any other Party or otherwise depleted from the M.D.L. 378 Escrow.

ii. *Second Distribution.* One year after the Resellers Initial Distribution and subject to Paragraph II.B.2.h, the sum of (i) the amount of $13,790,323, which shall include the Resellers Excess Funds, if any, and (ii) the amount of any deduction made from S44,690,371 under the Resellers Initial Distribution pursuant to Paragraph II.B.2.b.i. (hereinafter the Resellers Second Distribution) shall be disbursed from the M.D.L. 378 Escrow to the Resellers Escrow for further distribution pursuant to the Resellers Order.

c. *Retailers.*

i. *Initial Distribution.* The amount of $44,690,371 shall be segregated, pursuant to Paragraph II.B.1.a. into the Retailers Account for disbursal, pursuant to Paragraph II.B.1.b, to the Retailers Trustee (hereinafter the Retailers Initial Distribution) for further distribution pursuant to the Order Approving Independent Retailers of Motor Fuels Group Administration and Trust Agreement (hereinafter the Retailers Order attached hereto as Exhibit C). In the event the Total Fund is less than $1.433 billion on the date of the Approval Order, then 2.25 percent of the difference between $1.433 billion and the Total Fund shall be deducted from the Retailers Initial Distribution. In the event the Total Fund exceeds $1.433 billion at the time of the Approval Order, then 2.25 percent of the amount by which the Total Fund exceeds $1.433 billion, plus interest thereon, not to exceed $13,790,323 (hereinafter the Retailers Excess Funds), shall be segregated for disbursal to the Retailers Trustee on the

first anniversary of the Retailers Initial Distribution, and shall not be disbursed to any other Party or otherwise depleted from the M.D.L. 378 Escrow.

ii. *Second Distribution.* One year after the Retailers Initial Distribution and subject to Paragraph II.B.2.h, the sum of (i) the amount of $13,790,323, which shall include the Retailers Excess Funds, if any, and (ii) the amount of any deduction made from $44,690,371 under the Retailers Initial Distribution pursuant to Paragraph II.B.2.c.i. (hereinafter the Retailers Second Distribution) shall be disbursed from the M.D.L. 378 Escrow to the Retailers Trustee for further distribution pursuant to the Retailers Order.

d. *Airlines.*

i. *Initial Distribution.* The amount of $29,793,581 shall be segregated, pursuant to Paragraph II.B.1.a, into the Airlines Account for disbursal, pursuant to Paragraph II.B.1.b, to the Airlines Escrow (hereinafter the Airlines Initial Distribution) for further distribution pursuant to the Order Establishing Airlines Escrow and Prescribing Escrow Instructions (hereinafter the Airlines Order attached hereto as Exhibit D). In the event the Total Fund is less than $1.433 billion at the time of the Approval Order, then 1.50 percent of the difference between $1.433 billion and the Total Fund shall be deducted from the Airlines Initial Distribution. In the event the Total Fund exceeds $1.433 billion on the date of the Approval Order, then 1.50 percent of the amount by which the Total Fund exceeds $1.433 billion, plus interest thereon, not to exceed $9,193,548 (hereinafter the Airlines Excess Funds), shall be segregated for disbursal to the Airlines Escrow on the first anniversary of the Airlines Initial Distribution, and

shall not be disbursed to any other Party or otherwise depleted from the M.D.L. 378 Escrow.

ii. *Second Distribution.* One year after the Airlines Initial Distribution and subject to Paragraph II.B.2.h, the sum of (i) the amount of $9,193,548, which shall include the Airlines Excess Funds, if any, and (ii) the amount of any deduction made from $29,793,581 under the Airlines Initial Distribution pursuant to Paragraph II.B.2.d.i (hereinafter the Airlines Second Distribution) shall be disbursed from the M.D.L. 378 Escrow to the Airlines Escrow for further distribution pursuant to the Airlines Order.

e. *Agricultural Co-ops.*

i. *Initial Distribution.* The amount of $34,751,177 shall be segregated, pursuant to Paragraph II.B.1.a, into the Co-ops Account for disbursal, pursuant to Paragraph II.B.1.b, to the Co-ops Escrow (hereinafter the Co-ops Initial Distribution) for further distribution pursuant to the Order Establishing Agricultural Cooperatives Settlement Fund and Prescribing Provisions for the Administration and Distribution of the Fund (hereinafter the Co-ops Order attached hereto as Exhibit E). In the event the Total Fund is less than $1.433 billion on the date of the Approval Order, then 1.75 percent of the difference between $1.433 billion and the Total Fund shall be deducted from the Co-ops Initial Distribution. In the event the Total Fund exceeds $1.433 billion at the time of the Approval Order, then 1.75 percent of the amount by which the Total Fund exceeds $1.433 billion, plus interest thereon, not to exceed $10,725,806 (hereinafter the Co-ops Excess Funds), shall be segregated for disbursal to the Co-ops Escrow on the first anniversary of the Co-ops Initial Distribution, and shall not be disbursed to any other

Party or otherwise depleted from the M.D.L. 378 Escrow.

ii. *Second Distribution.* One year after the Co-ops Initial Distribution and subject to Paragraph II.B.2.h, the sum of (i) the amount of $10,725,806, which shall include the Co-ops Excess Funds, if any, and (ii) the amount of any deduction made from $34,751,177 under the Co-ops Initial Distribution pursuant to Paragraph II.B.2.e.i (hereinafter the Co-ops Second Distribution) shall be disbursed from the M.D.L. 378 Escrow to the Co-ops Escrow for further distribution pursuant to the Co-ops Order.

iii. *Indemnification.* Any Co-op receiving payment from the Co-ops Escrow agrees to indemnify all other Parties to this Agreement for any claims for refund based on Alleged Crude Oil Violations which are brought by any of its member-patrons but only to the extent of the amount of payment received by that Co-op from the Co-ops Escrow.

iv. *Reserve.* The Co-ops eligibility criteria set forth in Paragraph I.G provides for a restitutionary mechanism that will benefit farmers and other agricultural end-users that obtained petroleum products from agricultural cooperatives which they owned and operated for their mutual benefit. If an appeal is taken by a co-op from the Approval Order which challenges its own ineligibility under paragraph I.G, the Administrator of the Co-ops Fund shall seek an order of the District Court to establish a sufficient reserve pending final resolution of the ineligibility challenge. Such appeal shall not prevent or delay the distribution of funds from any Account to the Parties, or to or from any of the Escrows, for further distribution, except as to any reserve established hereunder.

f. *Surface Transporters.* The amount of $10,750,000 shall be segregated, pursuant to Paragraph II.B.1.a, into the Surface Transporters Account for disbursal, pursuant to Paragraph II.B.1.b, to the Surface Transporters Escrow for further distribution pursuant to the Order Establishing Surface Transporters Escrow (attached hereto as Exhibit F).

g. *Utilities.* The amount of $5,250,000 shall be segregated, pursuant to Paragraph II.B.1.a, into the Utilities Account for disbursal, pursuant to Paragraph II.B.1.b, to the Utilities Escrow for further distribution pursuant to the Order Establishing Utilities Escrow (attached hereto as Exhibit G).

h. *Conditions Applicable to Second Distributions.* All funds, other than the DOE/Amoco Stripper Fund, deposited after the date of the Approval Order in the M.D.L. 378 Escrow and the amounts, if any, of Resellers Excess Funds, Retailers Excess Funds, Airlines Excess Funds and Co-ops Excess Funds, shall be specifically reserved for payment of Second Distributions pursuant to Paragraphs II.B.2.b.ii, c.ii, d.ii, and e.ii, until each of such Second Distribution amounts has been fully funded. When any group has received an amount in satisfaction of its Second Distribution, the amount thereafter required to be reserved shall be reduced by the maximum amount of that group's Second Distribution as described in Paragraph II.B.2.b.ii, e.ii, d.ii, or c.ii. No disbursements shall be made from the funds deposited after the date of the Approval Order in the M.D.L. 378 Escrow until the Resellers, Retailers, Airlines and Co-ops have been paid their Second Distributions or until such amounts have been specifically reserved in the M.D.L. 378 Escrow for payment to the Settlement Escrows of Resellers, Retailers, Airlines and Co-ops. In the event funds in the M.D.L. 378 Escrow on or after the first anniversary of each group's Initial Distribution equal or exceed the sum of the full

amounts of the Second Distribution pursuant to Paragraphs II.B.2.b.ii, c.ii, d.ii, and e.ii, but disbursement is stayed by reason of the pendency of an appeal, a proportionate share of any interest earnings of the M.D.L. 378 Escrow shall accrue to the benefit of and be added to the amounts of such Second Distributions effective from the first anniversary of the Initial Distribution until the earliest date disbursement of such Second Distribution is permitted. In the event the funds in the M.D.L. 378 Escrow on such first anniversary of the Initial Distribution are less than the sum of the full amounts of the Second Distributions to the Resellers, Retailers, Airlines and Co-ops pursuant to Paragraphs II.B.2.b.ii, c.ii, d.ii and e.ii, then, in satisfaction of their Second Distributions the administrators of the funds for the Resellers, Retailers, Airlines and Co-ops shall each have the separate right to elect to (i) receive the group's proportionate share of the funds in the M.D.L. 378 Escrow on such first anniversary in satisfaction of its Second Distribution or (ii) postpone the group's Second Distribution to a time of its choosing subsequent to the first anniversary of its Initial Distribution, but no later than the date of dismissal of the last individual case making up M.D.L. 378. If any of the administrators of the funds for the Resellers, Retailers, Airlines or Co-ops elects to receive the group's Second Distribution under (ii) above at a time when the funds in the M.D.L. 378 Escrow are less than the sum of the full amounts of the Second Distributions to the Resellers, Retailers, Airlines and Co-ops which remain unsatisfied, then its Second Distribution amount shall be equal to its proportionate share of the funds in the M.D.L. 378 Escrow at the time it elects to receive its amount in satisfaction of its Second Distribution. Each group's proportionate share shall be equal to a ratio, the numerator of which shall be the full amount of that group's Second Distribution and the denominator of which shall be the sum of the full amounts of the Second Distribution of that group and

all other groups which have not yet elected to receive their Second Distributions.

3. *Distributions to DOE and the States.*

a. *DOE/States Available Fund Disbursement.* Except as provided in Paragraphs II.B.3.c, d, and e, 50 percent of that portion of the Total Fund which is not required to be segregated or reserved on the date of the Approval Order under Paragraph II.B.2 or set aside under Paragraph II.C (hereinafter the Available Fund) shall be paid to the States pursuant to Paragraph II.B.1. in the manner and for the restitutionary uses described in Paragraph II.B.3.f, provided that the amount paid to any State shall be reduced by the amounts, if any, disbursed for litigation expenses pursuant to a designation under Paragraph II.B.3.f.iii, and the remainder of such Available Fund (less $50 million reserved to assure the disbursement to the States from OHA as provided in Paragraph IV.B.7) shall be disbursed to or retained by DOE.

b. *DOE/States Incremental Fund Disbursement.* Except as provided in Paragraphs II.B.3.c, d, and e, after the disbursement under Paragraph II.B.3.a, every 90 days, or each time the amounts in the M.D.L. 378 Escrow (excluding amounts reserved under Paragraph II.B.2.h and amounts set aside pursuant to Paragraph II.C) (hereinafter the Incremental Fund) reach $10 million, whichever is earlier, 50 percent of the Incremental Fund shall be disbursed to the States in the manner and for the uses described in Paragraph II.B.3.f, provided that the amount paid to any State shall be reduced by the amounts, if any, disbursed for litigation expenses pursuant to a designation under Paragraph II.B.3.f.iii, and the remainder of the Incremental Fund shall be disbursed to or retained by DOE.

c. *Advance Fund.* The disbursement of 50 percent of the Available Fund to the States shall be increased by an additional amount of $200 million (hereinafter the

Advance Fund) from that portion of the Available Fund which would otherwise be disbursed to or retained by DOE. The DOE shall be reimbursed for the Advance Fund as follows:

i. after the total amount of $924,560,500 has first been disbursed to DOE and the States from the Available Fund, or from the Available Fund and the Incremental Fund, from the next $400 million of disbursements to DOE and the States from the Available Fund and the Incremental Fund, $100 million more will be disbursed to DOE than otherwise would be disbursed under II.B.3.a and b, by reallocating to DOE one-half of the States' disbursement(s) from disbursements of such $400 million; and

ii. after the total amount of $100 million of the funds attributable to Alleged Crude Oil Violations has been disbursed by OHA to DOE and the States pursuant to Paragraph IV.B.7, from the next $400 million disbursed by OHA, $ 100 million more will be disbursed to or retained by DOE than otherwise would be disbursed or retained under Paragraph IV.B.7, by reallocating to DOE one-half of the States' disbursement(s) from disbursements of such $400 million.

d. *Funding of Second Distributions.* In calculating the amount of funds to be disbursed to DOE and the States from the Incremental Fund, the disbursements and/or reservations of monies in the Incremental Fund under Paragraph II.B.2.h shall be deducted from the first funds which otherwise would have been disbursed to DOE fron the Incremental Fund; provided, however, that no amount shall be disbursed pursuant to Paragraph II.B.3.b until the amount required to be reserved in Paragraph II.B.2.h has been fully funded. Reimbursement by the States to DOE for not nore than one-half of the amount of the disbursements and/or

reservations under Paragraph II.B.2.h shall be effectuated by a reduction in the disbursements to the States that otherwise would be made under Paragraphs II.B.3.b and c by an amount equal to 3.875 percent of each combined DOE/States disbursement from the Incremental Fund and an increase in the disbursements to DOE by a corresponding amount.

e. *Assurance Fund.* The amount of $50 million from the Available Fund that would otherwise be segregated into the DOE Account on the date of the Approval Order shall be reserved (hereinafter the Assurance Fund) to assure the disbursement to the States from OHA, provided in and to be disbursed pursuant to, Paragraph IV.B.7. This $50 million amount will be treated for purposes of the calculations in Paragraphs II.B.3.a, b, c, and d as having been disbursed in its entirety to DOE under Paragraph II.B.3.a irrespective of whether all or a portion of such $50 million is disbursed to the States pursuant to Paragraph IV.B.7.

f. *State Use of Funds.* Funds available for distribution to the States shall be allocated among them on the basis of historical consumption patterns of refined petroleum products in the United States during the Settlement Period in the proportions as set forth in Exhibit H hereto, provided that no funds shall be distributed to a State until such State has submitted the signed Letters of Assurance required by this Paragraph. The payment mechanism set forth herein shall be the exclusive means of achieving distribution of the funds. The Attorney General of each State shall deliver to the Governor of such State, for the Governor's execution, duplicate originals of a Letter of Assurance in the form set forth in Exhibit I to this Agreement. Within 20 days following the date of the Approval Order, the Attorney General shall deliver to the Clerk of the Court and to the Administrator of ERA, DOE, such Letters of Assurance signed by the Governor of such State. At the same time, the Attorney General of each

State shall designate in writing to the disbursing official of the M.D.L. 378 Escrow whether disbursement shall be by check or by wire transfer, and if by wire transfer, shall provide instructions for the transmittal of funds. Disbursement of all funds to such State thereafter shall be in the form designated by the Attorney General and made payable to "The State of _____". Physical delivery of a check shall be made by the disbursing official to the Attorney General and in the case of a wire transfer, advance written notice of the date and amount of the wire transfer shall be delivered to the Attorney General prior to the sending of each wire transfer. Upon receipt of each check or wire transfer notice, the Attorney General shall deliver it promptly to the Governor of such State. As used in this Paragraph II.B.3.f, "Attorney General" means the Attorney General of a State, or his or her duly authorized representative, and includes any other State official who intervened in M.D.L. 378 prior to the execution of the Memorandum of Understanding of January 24, 1986 preceding this Agreement. In the case of any State where an official other than or in addition to the Attorney General intervened in M.D.L. 378 prior to January 24, 1986, all references in this Paragraph II.B.3.f to the Attorney General shall mean the Attorney General jointly with such official. Such funds (including interest earned on the funds following their receipt by the States) will be utilized as follows:

i. *Public Notice.* Each State will give reasonable notice to the public that it has received the funds and will generally describe the types of restitutionary programs on which the, State may expend the funds. Each State will conduct informal hearings at which the public may present its views concerning such expenditures. Any State which has held hearings with regard to the uses of oil overcharge refunds during the two-year period preceding the date of the Approval Order will not be required to hold additional hearings.

Legislative hearings in accordance with applicable State procedures shall be sufficient to comply with the requirements of this subsection.

ii. *Restitutionary Program.* Monies received by any State shall be utilized to fund one or more existing or new energy-related programs which are designed to benefit, directly or indirectly, consumers of petroleum products within the State. State governments are familiar with the particular energy needs of their citizens, and therefore they are in the best position to select the specific programs that will most effectively provide restitution to their citizens. In order to provide the flexibility to select from a complement of approved options which will insure consideration of local needs and circumstances, each State will be accorded discretion in selecting specific programs to provide widespread benefits to consumers of petroleum products; provided, however, that each State shall take into consideration the facts relating to usage of petroleum products within such State during the Settlement Period by various categories of such consumers and that the funds received by each State will be used to supplement, and not to supplant, funds otherwise available for such programs under Federal or State law. State funding of programs shall be limited to (1) those approved by OHA in Subpart V refund proceedings; (2) those referenced in the consent order which DOE entered into in 1981 with Standard Oil Company of California (Chevron) (46 *Fed. Reg.* 52221; October 26, 1981); (3) the types of energy conservation activities set forth in the following legislation:

(a) Part A of the Energy Conservation and Existing Buildings Act of 1976 (relating to weatherization of buildings; 42 U.S.C. 6861 *et seq.*);

(b) Part D of Title III of the Energy Policy and Conservation Act (relating to primary and supplemental State energy conservation programs; 42 U.S.C. 6321 *et seq.*);

(c) Part G of Title III of the Energy Policy and Conservation Act (relating to the energy conservation for schools and hospitals; 42 U.S.C. 6371 *et seq.*);

(d) The National Energy Extension Service and Conservation Act (relating to the promotion of conservation by small businesses and individuals; 42 U.S.C. 7001 *et seq.*); and

(e) The Low-Income Home Energy Assistance Act of 1981 (relating to assisting the poor with home utility bills; 42 U.S.C. 8621 *et seq.*);

and (4) such other restitutionary programs as may be approved by the District Court. Exhibit J exemplifies the programs approved by DOE and referenced above.

i. *Administrative Expenses.* Each State shall be entitled to expend for administrative expenses up to the amounts permitted by Federal legislation or regulation governing federally funded programs comparable to those identified in Paragraph II.B.3.f.ii and, where there is no such Federal legislation or regulation, up to five percent of the funds allocated pursuant to Exhibit H. Administrative expenses shall include the payment or reimbursement of attorneys' fees, expert witness' fees, contractual obligations and other related costs incurred in connection with pursuit of the State's Alleged Crude Oil Violations claims. The Attorney General of a State shall designate, by written notice filed with the disbursing official, the amount and manner of direct disbursements, if any, for payment or reimbursement of such litigation expenses.

ii. *Reporting of Expenditures.* At least 30 days prior to the expenditure of funds or permissible payments under this Agreement, each State shall submit a report to the District Court in M.D.L. 378 and to the Secretary of Energy identifying the programs or payments for which such funds will be expended. Within 30 days after the close of its fiscal year, each State shall submit a report to the District Court in M.D.L. 378 and to the Secretary of Energy concerning the uses for which the funds received under this Agreement have been expended and the amounts expended for each use, until all funds shall have been expended.

g. DOE Funds. Funds to be disbursed to DOE pursuant to this Agreement may be transmitted by check or by wire transfer to the Controller, DOE. Funds disbursed to or retained by DOE shall be subject to the further instruction of the Secretary, DOE, or his designee, for deposit in the U.S. Treasury or for such purpose as he may direct, consistent with law and this Agreement.

C. The Set Aside

1. *Pending Litigation.* The Parties recognize that there is certain litigation now pending in the District Court which is not presently part of M.D.L. 378 but which involves the same crude oil miscertifications as those in M.D.L. 378. Specifically, *Kerr-McGee Corporation v. Gulf Oil Corporation*, Case No. 84-1061, and *Total Petroleum Corporation v. Muskegon Oil Company*, Case No. 85-1968-T, involve claims by first purchasers of the miscertified stripper oil under Section 210 of the Economic Stabilization Act of 1970, 12 U.S.C.A. 1904 (note) (hereinafter the ESA).

2. *Escrow Set Aside.* On the date of the Approval Order and prior to any distribution hereunder, $30 million for *Kerr-McGee v. Gulf,* and $10 million for *Total v. Muskegon,*

of the M.D.L. 378 Escrow shall be set aside and retained in escrow, together with interest thereon, to satisfy any final judgment obtained by the plaintiffs in either of the above mentioned cases in the event the District Court rules in M.D.L. 378 that such judgment should be satisfied directly or indirectly out of such funds; provided, however, that this set aside does not compromise or otherwise preclude any Party hereto from maintaining that such judgment should not be satisfied directly or indirectly out of such funds; and provided further that this paragraph shall confer no standing in those cases on any Party which it would not otherwise have. Set aside funds not used to satisfy any such final judgment shall be deemed to be funds deposited in the M.D.L. 378 Escrow after the date of the Approval Order.

3. *Future Set Asides*. In the event that any Party (1) was a party to M.D.L. 378; (2) was dismissed from that litigation; (3) withdrew funds from the M.D.L. 378 Escrow in connection with such dismissal; and (4) hereafter becomes a party to M.D.L. 378 and repays the previously withdrawn funds to the M.D.L. 378 Escrow plus the amount of uncontested interest, then a sufficient amount of the repaid funds shall be set aside by the District Court to satisfy any Section 210 ESA claim asserted in litigation prior to December 1, 1985 against that Party which involves the same crude oil miscertifications as those in M.D.L. 378 to the same extent and with the same limitation as in Paragraph II.C.2. Such repayment shall not be deemed to affect any dispute which may exist as to any additional amount which may be required to be paid into the M.D.L. 378 Escrow by that Party.

III. WAIVERS, RELEASES AND EXCLUSIONS

A. Waivers and Releases

1. *Release of Claims to Crude Oil Funds.* Subject to Paragraphs II.B.1 and 2 and effective upon the Payment Date, the Parties other than DOE and the States release, waive, and agree to withdraw any claims before any Federal or state court or agency, including the District Court in M.D.L. 378 (except any claims specifically excluded in Paragraphs II.C, III.A.4-5, III.B.1-10, IV.A and V.G): (a) against funds which have been or will be paid to satisfy compliance or enforcement actions (including declaratory actions) brought or to be brought based on Alleged Crude Oil Violations, including recoveries of such funds (i) within DOE's control, or (ii) in escrows created or to be created by DOE, any court or agency, and (b) against the orders or agreements by which such funds have been or will be created or maintained. As to the funds described in Paragraph II.B and Part IV of this Agreement, all Parties waive and release any claim other than claims under this Agreement, to: (a) the funds disbursed or to be disbursed to or retained by DOE, except those claims specifically excluded in Paragraph V.G; and (b) the funds disbursed or to be disbursed to the States.

2. *Refiners Release.* Prior to distribution by the Refiners Escrow Agent, the Refiners Escrow Agent shall secure from each Refiner receiving funds hereunder the waiver and release in the form set forth in Attachment A to the Refiners Escrow Agreement (hereinafter the Refiners Release). The Parties agree that the Refiners Distribution and the waiver and release of claims to funds covered by Parts II and IV hereof shall not be affected by Part V.

3. *Other Releases.* As a condition to receiving any payment from their respective Escrows, each Reseller, Retailer, Airline, Co-op, Surface Transporter and Utility

claimant, seeking payment from such an Escrow shall execute and deliver the waiver and release pertinent to it, including a waiver and release of all claims which a Party waives under Paragraph III.A. 1, in the form set forth in Exhibits B, C, D, E, F or G hereto, which shall be deemed to be effective upon the Payment Date. Upon receipt of any payment from their respective Escrows each Reseller, Retailer, Airline, Co-op, Surface Transporter and Utility claimant except as to claims excluded in Paragraphs III.A.5, III.B.6, and V.G, shall also withdraw all covered claims for funds based upon Alleged Crude Oil Violations, except as otherwise excluded, pending before any court or Federal agency. Such waiver and release, however, shall not affect the right of Reseller, Retailer, Airline, Co-op, Surface Transporter and Utility claimants to any future payments from their respective Escrows.

4. *Certain Claims Reserved.* Nothing in this Agreement shall be construed or shall constitute a release of any Reserved Offset Claim or Reserved Claim as defined in and reserved under Paragraphs (B) or (E), respectively, of the Refiners Release and made in any pending or future litigation or proceeding.

5. *Section 210 Claims.* Nothing in this Agreement or in any release executed pursuant hereto shall waive or release any claim in private litigation under Section 210 of the ESA by a Party (or Person who files a claim and signs a release pursuant to this Agreement or any Exhibit hereto) against a Person who is not or does not become a Party or a claimant. Effective upon the Payment Date all Parties to this Agreement waive and release as to each other any claims or actions which have been or may be brought pursuant to Section 210 of the ESA seeking recovery for Alleged Crude Oil Violations, except (a) claims, defenses, counterclaims and claims of offset reserved in Paragraph III.A.4; (b) claims asserted by Refiners as first purchasers in private litigation commenced prior to

December 1, 1985 involving claims of overcharges in first sales of crude oil (other than any such claim based upon the effort or impact or influence upon the Entitlements Program resulting from the improper certification of crude oil under the Crude Oil Regulations which is not excluded and excepted in Paragraphs (B) and (E)-(R), both inclusive, of the Refiners Release); and (c) all claims asserted prior to December 1, 1985 pursuant to Section 210 of the ESA by the parties in *Kern Oil & Refining Co. v. Tenneco Oil Co.*, Nos. CV 81-3253 LEW, CV 82-6875 (C. D. Cal.); provided that the reservation in this Paragraph of any such private action and recovery under Section 210 of the ESA shall in no way affect the waiver of claims to funds set forth in Paragraph III.A.1 of this Agreement, and provided further that this Paragraph shall in no way affect claims brought by DOE in any such action.

6. *Amoco.* Provided Amoco becomes a Party, and effective upon the Payment Date, all other Parties waive and release any claims or actions which have been or could have been brought pursuant to Section 210 of the ESA, or otherwise, relating to Alleged Crude Oil Violations based on Amoco's pricing of injection well crude oil refined by Amoco, which had never been sold to, or transferred to, a third party (self-refined crude oil), or relating to DOE's exercise of its enforcement discretion in resolving DOE's claims for Alleged Crude Oil Violations pertaining to Amoco's self-refined crude oil, except claims, defenses, counterclaims or claims of offset reserved in Paragraphs III.A.4 and III.A.5.

7. *Consumers Power.* If Exxon becomes a Party, on the Payment Date, all Parties, and any Affiliates of any Party, which are plaintiffs or intervenors in *Consumers Power Company, et al. v. Exxon Corporation*, Civil Action No. H83-0610 (N.D. Ind.), shall dismiss their complaints in that litigation, with prejudice.

B. Exclusions

1. *DOE v. Hunt.* Except as provided in Paragraph (G) of the Refiners Release, the Parties specifically do not compromise their claims, counterclaims, defenses, rights to intervene or other rights asserted prior to December 1, 1985, in *DOE v. Hunt*, Nos. 5-101, 5-102 (Em. App.), with respect to any funds heretofore paid or deposited in escrow for disposition pursuant to a final judgment in such action, except that, once the claims, counterclaims and defenses of the parties in that action are resolved or settled and satisfied, distribution of any funds remaining in escrow shall, with the approval of the court, be governed by this Agreement.

2. *Diamond Shamrock.* Except as provided in Paragraph III.A.6 hereof and, as to Refiners, Paragraph (G) of the Refiners Release, the parties to such litigation specifically do not compromise their claims, counterclaims, defenses, rights to intervene or other rights as against one another asserted prior to December 1, 1985, in *Diamond Shamrock Refining and Marketing Co. v. Standard Oil Co.* Civil Action No. C2-84-1432 (S.D. Ohio), or with respect to any funds heretofore paid or deposited in escrow for disposition pursuant to a final judgment in such action except that, once the claims, counterclaims and defenses of the Refiners in that action are resolved or settled and satisfied, distribution of any funds remaining in escrow shall, with the approval of the court, be governed by this Agreement.

3. *Citronelle.* This Agreement also specifically excludes (a) any amounts held in escrow pursuant to any administrative or court order in existence as of the date of this Agreement in *In Re Three Forty One (341) Tract Unit of the Citronelle Field*, OHA Case Nos. BEN-0078, *et al.*; which may be refunded or paid to Refiners pursuant to adjudication or settlement of said matters before OHA and (b) any amounts previously held in escrow pursuant to such orders or any other

funds at issue in such matters which may be refunded or paid to Refiners; and the Parties specifically do not compromise their claims, counterclaims, defenses, rights to intervene or other rights asserted prior to December 1, 1985, in *Exxon Corporation, et al. v. DOE. et al. (The 341-Tract Unit of the Citronelle Field)*, No. 81-25 MMS or *Texaco, Inc., et al. v. DOE, et al*, No. 81-99 MMS (D. Del.), with respect to funds which may be in dispute or in issue in those proceedings. Notwithstanding the exclusion from this Agreement of the funds described in the preceding sentence, no purchaser of crude oil from the 341 Tract Unit of the Citronelle Field shall hereafter have any liability under any statutes or regulations administered by or orders issued by DOE with respect to, or suffer any detriment as a result of, the issues and claims contained in those cases and decisions referenced by the following citations: OHA Case Nos. BEN-0078 (7 DOE ¶81,140); DEE-7746, HED-0079 (10 DOE ¶81,027); and BEX-0180 (9 DOE ¶82,509). Any and all such existing liabilities are forever extinguished.

4. *Gulf/Cities*. Nothing in this Agreement shall in any way apply to or in any way limit any claims, counterclaims, affirmative defenses or any other contentions of the parties in any litigation arising out of or relating to Gulf's 1982 proposed merger with Cities Service Company or Gulf's tender offer for or purchase of Cities Service Company stock in 1982; provided that nothing in the reservation of such action shall in any way affect the waiver and release of claims to the funds covered elsewhere in this Agreement.

5. *Ashland.* Nothing in this Agreement shall limit the claims of Ashland Oil Inc. left open by TECA in *New York Petroleum Corp. v. Ashland Oil, Inc.*, 757 F.2d 288 (Em. App. 1985), as to the funds in that case.

6. *Getty/Sohio*. The matters in *Getty Oil Co.*, OHA Case No. HRR-0074 (and related cases), concerning the yet

undetermined issues of liability remanded by the District Court in *Getty Oil Co. v. DOE*, C.A. No. 77-434 (D. Del.), are excluded from this Agreement, provided, however, that to the extent the funds arising out of such matters are determined to be Alleged Crude Oil Violations funds, the provisions of paragraph IV.B hereof shall apply.

7. *Other Funds Not Affected.* Nothing in this Agreement may be construed to adversely affect the right of any Party to retain any Alleged Crude Oil Violation funds which that Party has received or has heretofore become entitled to receive pursuant to a final agency or court order, except that funds held in escrow by DOE for restitutionary redistribution are subject to this Agreement unless elsewhere otherwise provided in this Agreement. DOE and the States do not waive or release any claim to funds returned to a Party which (a) was a party to M.D.L. 378; (b) was dismissed from that litigation; and (c) withdrew such funds from the M.D.L. 378 Escrow in connection with such dismissal. Nothing in this Agreement shall prevent any Party in any Alleged Crude Oil Violation litigation from asserting a claim (other than a claim that the measure of liability for an overcharge for crude oil is different than the excess of the actual price received above the applicable ceiling price under the Crude Oil Regulations) that funds have been deposited erroneously in an escrow in that litigation in excess of that Party's actual liability so long as such funds remain undistributed from such escrow or such claim is asserted as an offset to a claim that additional monies should be paid into such escrow.

8. *Hawkins Field.* This Agreement shall have no effect on the distribution of the funds to the States in *United States v. Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (Em. App. 1985), cert. denied, 54 USLW 3495 (Jan. 28, 1986) (Nos. 85-429 *et al.*), provided, however, (a) nothing in this Agreement shall in any way affect the rights, if

any, of Exxon to seek reversal, revision or reconsideration of the judgment of the district court entered in that case, and (b) if such district court judgment is reversed or set aside by the Supreme Court, then in such event Exxon's execution of this Agreement or of the Refiners Release shall not affect Exxon's rights, if any, in such litigation including, without limitation, its claims, if any, to recover funds paid by Exxon in that litigation, except only to the extent, if any, that any such claim or right may be affected or limited by the provisions of Paragraph (B) of the Refiners Release.

9. *Department of Interior.* Nothing in this Agreement shall limit by a Party any claim against the United States Department of Interior which claim arises out of or is related to Alleged Crude Oil Violations in sales of crude oil by the United States Department of Interior.

10. *Tertiary Incentive Claims.* Nothing in this Agreement shall limit any claim or defense which is preserved under Paragraph (R) of the Refiners Release by a Party for or against recovery of Tertiary Incentive Revenue (as defined in the Tertiary Incentive Program regulations) the Tertiary Incentive Program regulations, originally appearing in 10 C.F.R. § 212.78 and thereafter amended.

IV. OTHER ALLEGED CRUDE OIL VIOLATIONS PROCEEDINGS

A. Pending and Future DOE Actions.

1. *Pending DOE Actions.* Except for the matters which are settled herein, DOE intends, and retains full authority, to continue to prosecute and seek appropriate restitutionary remedies for unresolved alleged violations. The defenses assertable by any party in such actions shall in no way be impaired or otherwise affected by this Agreement or any waiver and release executed pursuant hereto (except insofar as any such defense may assert a restitutionary right to

recover, as an injured party, Alleged Crude Oil Violations funds paid or to be paid by others, or by such party in any other action, and held by DOE or a court or otherwise subject to this Agreement that has otherwise been waived and released under this Agreement). Funds attributable to injection well issues paid or escrowed or to be paid or escrowed by a former party to M.D.L. 378 shall be deemed to be M.D.L. 378 Escrow funds and deposited therein as of the date of such payment or escrow, whether or not paid into the M.D.L. 378 Escrow. In those instances where DOE proposes to enter into a settlement regarding an Alleged Crude Oil Violation, the States will be accorded the courtesy of reasonable notice by DOE of the amount to be recovered prior to the actual signing of such proposed settlement by any of the parties thereto. Nothing in this Paragraph shall in any way affect claims pursuant to Section 210 of the ESA which are reserved under Paragraph III.A.5 of this Agreement.

2. *Future DOE Actions.* With the sole exception set forth in Paragraph II.A.4, nothing in this Agreement shall be read or construed to limit or render reviewable the exercise of DOE's prosecutorial discretion in determining the appropriate action to take, if any, with regard to any enforcement matter. Further, nothing in this Agreement shall be read or construed to impose any obligation or duty upon the DOE regarding the enforcement or non-enforcement of its regulations, and it remains solely in the DOE's discretion to determine whether an enforcement proceeding should be initiated, settled, pursued on particular terms or terminated.

B. Pending and Future Proceedings.

DOE and the States agree:

1. *Modification of Policy.* In order to carry out its remedial authority under the ESA and EPAA, within 20 days following the date of the Approval Order, DOE will issue a

modification of the Statement of Restitutionary Policy concerning Alleged Crude Oil Violations issued on June 21, 1985 (50 Fed. Reg. 27400; July 2, 1985). DOE will publish that modification (hereinafter the Modified Policy) in the Federal Register. The Modified Policy will state that the policy of DOE is to process applications for refunds pursuant to existing Subpart V regulations and that in such administrative proceedings involving Alleged Crude Oil Violations, OHA will continue to require that each claimant must affirmatively demonstrate that it has been injured by the alleged violation and that it should therefore receive a refund. *See eg. Office of Special Counsel/Tenneco Oil Co.*, 9 DOE ¶82, 538 at 85,206 (1982). The Modified Policy will state that individuals claiming such injury may file claims but OHA will not accept claims on behalf of classes, associations or trade groups. Nothing in the Modified Policy will preclude a claimant from attempting to prove injury through the use of econometric evidence of the type that was submitted in the Stripper Well evidentiary proceedings before the OHA nor preclude OHA from using the findings contained in the Report of the Office of Hearings and Appeals, *In re The Department of Energy Stripper Well Exemption Litigation,* M.D.L. No. 378 (D. Kan., filed June 21, 1985). Nothing contained herein may be construed to amend the Subpart V regulations.

2. *Distribution of Future Funds.*

a. *Application of Policy.* The Modified Policy will also provide that, as to funds (other than the M.D.L. 378 Escrow and the DOE/Amoco Stripper Fund) for which those Persons ultimately affected by the Alleged Crude Oil Violations cannot be identified, it will be DOE's policy to exercise its remedial authority, or to recommend to any court that the court exercise its remedial authority, by paying 50 percent of such funds to the DOE, and 50 percent to the States in the proportions set forth herein on Exhibit H. The Modified

Policy will provide that all funds distributed to the States (including interest earned on the funds following their distribution to the States) shall be applied to benefit petroleum consumers in the manner described in Paragraph II.B.3.f. The States' programs shall be limited to the restitutionary programs approved by OHA in Subpart V proceedings (*see, e.g.*, Exhibit J), those referenced in DOE's Chevron consent order, the types of activities identified in the legislation enumerated in Paragraph II.B.3.f.ii(3), and any others approved by a court with appropriate jurisdiction or OHA. The Modified Policy also will provide that each State shall be entitled to expend for administrative expenses, including the payment or reimbursement of attorneys' fees, expert witness' fees, contractual obligations and other related costs incurred in connection with the States' claims with respect to Alleged Crude Oil Violations, up to the amounts permitted by Federal legislation or regulation governing comparable Federally funded programs and, where there is no such Federal legislation or regulation, up to 5 percent of the funds allocated pursuant to Exhibit H.

b. *Payment Mechanism.* The payment mechanism set forth herein shall be the exclusive means of achieving distribution of the funds. The Attorney General of each State shall deliver to the Governor of such State, for the Governor's execution, a Letter of Assurance in the form set forth in Exhibit I to this Agreement. Within 20 days following the date of the Approval Order, the Attorney General shall deliver to the Administrator of ERA, DOE, such Letter of Assurance signed by the Governor of such State. Delivery to the Administrator of ERA, DOE, of the signed, duplicate original Letter of Assurance required under Paragraph II.B.3.f of this Agreement shall constitute delivery of the Letter of Assurance required by this Paragraph. At the same time, the Attorney General of each State shall designate in writing to the DOE whether disbursement shall be by check or by wire

transfer, and if by wire transfer, shall provide instructions for the transmittal of funds. Disbursement of all funds to such State thereafter shall be in the form designated by the Attorney General and made payable to "The State of _____". Physical delivery of a check shall be made by DOE to the Attorney General and, in the case of a wire transfer, advance written notice of the date and amount of the wire transfer shall be delivered to the Attorney General prior to the sending of each wire transfer. Upon receipt of each check or wire transfer notice, the Attorney General shall deliver it promptly to the Governor of such State. As used in this Paragraph IV.B.2, "Attorney General" means the Attorney General of a State, or his or her duly authorized representative, and includes any other State official who intervened in M.D.L 378 prior to the execution of the Memorandum of Understanding of January 24, 1986 preceding this Agreement. In the case of any State where an official other than or in addition to the Attorney General intervened in M.D.L 378 prior to January 24, 1986, all references in this Paragraph IV.B.2 to the Attorney General shall mean the Attorney General jointly with such official. The Modified Policy will not require any procedures or standards other than those set forth in Paragraph II.B.3.f of this Agreement.

3. *Modification of DOE Order.* At the same time the Modified Policy is issued, DOE will take the steps necessary for issuance of an Order modifying the Order Implementing Departmental Policy Regarding Crude Oil Overcharges issued by OHA on June 21, 1985 (*50 Fed. Reg.* 27402, July 2, 1985) to provide that DOE's Modified Policy will be followed in all Subpart V proceedings involving Alleged Crude Oil Violations presently or hereafter coming under its jurisdiction.

4. *Expeditious Issuance of Orders.* DOE also will take the steps necessary to assure the expeditious issuance of orders or the filing of appropriate recommendations in all

pending cases involving Alleged Crude Oil Violations (other than M.D.L. 378), including but not limited to those listed in Exhibit K to this Agreement, except as to such cases where the DOE is not a party and except in cases specifically exempted from this Agreement, in order to distribute the funds subject to those proceedings pursuant to DOE's Modified Policy. With respect to such funds attributable to Alleged Crude Oil Violations presently in escrow under the control of the ERA, or which shall come under its control or be subject to agreements entered into by it in the future, petitions for the implementation of Subpart V proceedings or other actions to accomplish the distribution of such funds called for in this Agreement will be initiated as soon as practicable following the date of the Approval Order.

5. *Modification of PRO'S. etc.* To the extent any Order or Proposed Order with respect to an Alleged Crude Oil Violation provides for a different disposition of funds than provided by this Agreement, including DOE's Modified Policy, DOE will promptly take all steps available to implement, with respect to such Orders or Proposed Orders, the procedures and policies set forth herein; provided, however, that nothing herein shall affect any other portions of such Orders or Proposed Orders. Nothing in this Paragraph shall apply to the Amoco consent order insofar as that order applies to counting injection wells to qualify a property as a stripper well property.

6. *Future Subpart V Proceedings.* DOE further agrees that in all Subpart V proceedings involving Alleged Crude Oil Violations, OHA expeditiously will complete the processing of first stage refund claims and will issue the final decisions and orders disbursing all funds as to which those Persons ultimately affected cannot be identified pursuant to DOE's Modified Policy. OHA may reserve a reasonable portion of funds from each such proceeding to satisfy

potentially provable claims of identifiable injured claimants who have not waived their claims, but such reserve shall not exceed 20 percent of the monies in such proceeding and amounts in excess of the reserve shall be distributed while awaiting completion of the first stage refund proceedings. The percentage of the reserve will be altered within six months following the date of the Approval Order and periodically thereafter in subsequent proceedings to reflect the amount of reserve that is warranted and sufficient to provide adequate funding for eligible first-stage claims, and will be lowered as justified by claims experience as a consequence of this Agreement.

7. *Disbursement of OHA Funds.* Within 5 working days following issuance of the Modified Policy provided for in Paragraph IV.B.1, OHA will issue appropriate orders directing the disbursement of all Alleged Crude Oil Violations funds under DOE's control and available for distribution, (other than the M.D.L. 378 Escrow and the DOE/Amoco Stripper Fund) in an amount not less than $100 million, in equal shares to DOE and to the States, provided that no amount shall be distributed to a State until such State has submitted the Letter of Assurance required by Paragraph IV.B.2.b. Funds withheld from a State solely because of a failure to submit such a Letter of Assurance shall be deemed to have been disbursed to that State for the purposes of the remainder of this paragraph and an equal amount from the Assurance Fund shall be disbursed to DOE. If OHA issues such directive within the prescribed time and an amount of $50 million or more is disbursed to the States within 5 working days thereafter, the $50 million Assurance Fund from DOE's share of the M.D.L. 378 Escrow provided for in Paragraph II.B.3.e shall be disbursed to DOE. If OHA issues such directive within the prescribed time and an amount less than $50 million is disbursed to the States within 5 working days thereafter, an equal amount from the $50 million Assurance Fund from DOE's share of the

M.D.L. 378 Escrow provided for in Paragraph II.B.3.e shall be disbursed to DOE and the balance of said reserve shall be disbursed to the States without any repayment obligation. If OHA does not make any such distribution to the States, said $50 million Assurance Fund shall be disbursed to the States without any repayment obligation. Should an amount be paid to the States out of said $50 million Assurance Fund as provided above and in Paragraph II.B.3.c, for purposes of the Advance Fund repayment to be satisfied from incremental OHA disbursements, as provided in Paragraph II.B.3.c, OHA will be deemed to have made the required initial disbursement of $100 million. Disbursement of the DOE/Amoco Stripper Fund pursuant to this Agreement shall be deemed to constitute an appropriate exercise of the discretion of OHA and DOE under 10 C.F.R. Part 205, Subpart V but shall not be deemed a payment in satisfaction of OHA's $100 million obligation under this paragraph.

8. *Implementation in Other Cases.* As to pending or future government enforcement cases or declaratory judgment actions involving Alleged Crude Oil Violations, DOE will on the date of the Approval Order or at the earliest practicable date thereafter file the necessary motions, recommendations or other documents seeking immediate distribution and/or order of distribution in accordance with this Agreement. If any Person files suit to prevent or contest issuance of any notice, order, recommendation or payment under this Agreement, DOE will contest any such suit and will distribute the funds as provided in this Agreement unless barred from doing so by judicial order.

9. *Future Policy.* Consistent with the guidelines adopted by the Attorney General of the United States, "Departmental Policy Regarding Consent Decrees and Settlement Agreements", March 13, 1986, this Agreement does not limit or restrict the discretion of DOE to issue or

adopt any restitutionary policy concerning future Alleged Crude Oil Violations; provided, however, in order to resolve the remedial aspects of pending administrative and judicial proceedings involving Alleged Crude Oil Violations, that the Modified Policy will continue to apply to such proceedings pending on June 1, 1986.

V. ENTITLEMENTS LITIGATION

A. **Payments of Entitlements Settlement Funds.** The Refiners agree to allocate the Refiners Distribution of $298,514,000 to settle the pending litigation involving the January 1981 and Entitlements Adjustment Notices and certain other Entitlements Program claims as more fully provided in the Refiners Release to be executed pursuant to the Refiners Escrow Agreement. All Refiners entitled under Paragraph 5 or 8 of the Refiners Escrow Agreement to payment of money from the Sellers Account or Buyers Account, respectively, shall be paid by the Escrow Agent pursuant to such Paragraphs (hereinafter the Entitlements Disbursement) after disbursement of the Refiners Distribution or the Entitlements Disbursement funds to the Refiners Escrow Agent when (1) the Refiners Release is properly executed by that Refiner and delivered to the Escrow Agent within the time prescribed by the Refiners Escrow Agreement; (2) such Refiners Release is properly executed by each Refiner designated in Attachment C to the Refiners Escrow Agreement (hereinafter the Attachment C Releases) and delivered to the Escrow Agent within the time prescribed by the Refiners Escrow Agreement; and (3) this Agreement (a) receives Final Court Approval or (b) an order is issued pursuant to Paragraph II.B.1 of this Agreement permitting immediate disbursal to Refiners from the Refiners Escrow of the Refiners Distribution or the Entitlements Disbursement, whichever of (a) or (b) is the earlier (hereinafter Final Approval).

B. **Vacation of Entitlements Judgment.** Upon commencement of the Entitlements Disbursement, the parties agree jointly to take all appropriate steps to vacate the judgment of the district court in *Texaco Inc., et al v. Department of Energy, et al.*, 604 F. Supp. 1493 (D. Del. 1985), appeal pending Nos. 3-44 through 3-49 (Em. App.) (hereinafter *Texaco v. DOE*). If for any reason the judgment of the district court in *Texaco v. DOE* is not vacated pursuant to this Paragraph and a judgment on the merits in *Texaco v. DOE* becomes final and not subject to further appellate review (including review by the U.S. Supreme Court), such final judgment will herein be called a *Final Texaco Judgment*. If a *Final Texaco Judgment* reverses the judgment of the district court therein and requires that no further entitlements notice be issued by DOE, the Parties to the cases other than *Texaco v. DOE* listed in Paragraph V.E. below agree to dismiss such cases with prejudice.

C. **Acceptance of Funds**. Except as provided in Paragraphs III.A.4, III.B.3 and V.G, upon Commencement of the Entitlements Disbursement, and regardless whether a *Final Texaco Judgment* is issued, Refiners agree to accept such disbursements and the provisions of such Refiners Escrow Agreement as full accord and satisfaction of every claim relating to DOE's operation of the Entitlements Program for all periods covered by price and allocation controls including, but not limited to, the unissued Draft January 1981 List and Draft Cleanup List and DOE administrative actions.

D. **Buyers Relinquishment of Claims**. Effective upon commencement of the Entitlements Disbursement, and regardless whether a *Final Texaco Judgment* is issued, Refiners designated as Buyers on Attachment D to the Refiners Escrow Agreement relinquish any and all claims to the Sellers Account (other than any funds in the Sellers Account which are required to be transferred to the General

Account under the provisions of the Refiners Escrow Agreement); provided, however, that in the further event that (1) a *Final Texaco Judgment* is issued which requires DOE to issue any further Entitlement Notices, and (2) a Seller on such notices, which has not executed and delivered an acceptable Release pursuant to this Agreement, collects any monies from any Buyer which has executed and delivered an acceptable Release within the Claims Period provided for in the Refiners Escrow Agreement based on that Seller's entitlement sale right on such notices, then that Buyer will be entitled to recover from the Sellers Escrow the amount paid by that Buyer to that Seller, but no more than is allocated to that Seller on Attachment B to the Refiners Escrow Agreement and subject to the terms of Paragraph 6 of the Refiners Escrow Agreement.

E. **Withdrawal of Other Entitlements Litigation**. Within 10 days after commencement of the Entitlements Disbursement, all litigation, other than Texaco v. DOE, except as specifically excluded or reserved by Paragraphs III.B.3 and V.G, initiated by any Refiner against DOE involving any issue arising out of or involving the Entitlements Program shall be withdrawn or dismissed with prejudice and no further litigation against DOE involving any aspect of the Entitlements Program either past or future shall be instituted in any State or Federal court or agency of the United States Government, except as permitted in Paragraphs (A), (F) and (J) of the Refiners Release. Cases to be dismissed or withdrawn with prejudice shall include but not be limited to the following: *Ashland Oil v. DOE*, (W.D. Ky., Dkt. No. 81-0187L(B)); *Ashland Oil, Inc.* (FERC Dkt. No. RA 83-3-000); *Marathon Oil v. DOE* (N.D. Ohio, Dkt. No. 81-634); *Mobil Oil v. DOE* (N.D.N.Y., Dkt. No. 81-CV-340); and the cross claim of *Ashland Oil Company in Texaco v. DOE*, provided that nothing in this Agreement shall restrict or limit (1) a claim of an Entitlements Program violation by DOE

except as provided in Paragraph V.F or (2) any challenge or defense by a Refiner to such a DOE claim.

F. **Termination of Entitlements Actions by DOE.** After commencement of the Entitlements Disbursement and vacation of the judgment in *Texaco v. DOE*, DOE agrees that it shall not order the purchase or sale of any further entitlements, either through entitlements lists or as a result of any exception decisions, and shall not institute or voluntarily participate in any judicial or administrative proceedings pertaining to the publication of any further entitlements notices. After commencement of the Entitlements Disbursement and vacation of the judgment in *Texaco v. DOE*, DOE shall take no action whatsoever pertaining to entitlements obligations based on runs-to-stills or crude oil receipts after December 31, 1980, and further agrees to take no such action on the basis of any entitlements report filed by a Refiner with DOE for any reporting period after December 31, 1980, including reports filed with respect to the Entitlements Adjustment Notice (10 C.F.R. § 211.69).

G. **Preservation of Entitlements Claims.** This Agreement specifically excludes and preserves any and all claims by a Refiner applicant against DOE for payment by DOE of (i) exception relief from the crude oil Entitlements Program including, but not limited to, exceptions or adjustments based on or pursuant to *Delta/Beacon* or Naptha Entitlements relief, which has been or may be granted by the ERA, OHA, the Federal Energy Regulatory Commission, or any court or (ii) any adjustments or changes to the draft January 1981 Notice or Entitlements Adjustment Notice. This Agreement also specifically excludes any and all claims by a Refiner against DOE for interest on such adjustment or change or exception relief and for attorneys' fees and costs incurred in connection with such relief. DOE agrees to provide all funds necessary to fund and pay all amounts determined to be due

any Refiner pursuant to or as a result of any such adjustments or changes or relief including such interest and attorneys' fees, if awarded, out of its share of funds under this Agreement, or out of funds (other than funds resulting from violations or alleged violations except Alleged Crude Oil Violations) to which no other Party has a claim by virtue of this Agreement. DOE's obligations shall not affect the amount or timing of any payment to any other Party made pursuant to this Agreement.

H. **Entitlements Settlement Contingency.** In the event of a *Final Texaco Judgment* which requires DOE to publish entitlements notices, the DOE reserves the right to recoup from any Refiner which received exception relief funded pursuant to Paragraph G, the amount of that exception relief to the extent such entitlements notice provides a duplicate funding of such relief by affecting the entitlements position of such Refiner, and provided further that the Release executed by each Refiner shall remain effective, in accordance with and subject to the terms, provisions and exceptions set forth therein.

VI. MISCELLANEOUS

A. **Agreement Binding.** The provisions of this Agreement, which shall include the Exhibits hereto as though fully set forth in the text hereof, shall be binding upon (1) all the Parties hereto and (2) all Persons executing waivers or releases pursuant to this Agreement, and with respect to such Parties and Persons, their Affiliates, subsidiaries, member-patrons and their owners, and their member-patrons and their owners, officers, agents, attorneys and any other Persons while acting under their direction or control. As used herein, an "Affiliate" of any Party includes any Person (and the successors and assigns of such Person) which controls, is controlled by or is under common control with such Party. For this purpose, "control" means the power (existing on the Payment Date), by contract, partnership agreement, stock

ownership or otherwise, to control the policies and business operations of a Person, including, without limitation, the ownership, directly or indirectly (through one or more intermediaries), of shares of stock having the right to elect a majority of the Board of Directors of a corporate Person, or the ownership (on the Payment Date), directly or indirectly (through one or more intermediaries), of more than 49 percent of a Person.

B. **Support of Agreement.** The Parties to this Agreement shall support approval of all of its provisions, shall take all steps and make all filings necessary to its implementation at their own expense or from their respective Escrow funds. DOE will undertake the defense of this Agreement in response to any litigation, in which DOE is named as a party, challenging this Agreement or any action required to be taken by DOE pursuant thereto. However, DOE's agreement to this provision does not circumscribe the discretion of the Attorney General to authorize or preclude the filing of particular pleadings or the making of arguments by DOE in any litigation, and this Agreement shall not create any right of action against DOE concerning the initiation, continuation or conduct of any litigation. All Parties agree to cooperate (1) in defending this Agreement and (2) in any action required to be taken pursuant thereto in any litigation challenging its validity. All Parties also agree that they will fully support the procedures and policies set forth herein in all present and future proceedings involving Alleged Crude Oil Violations and, to the extent any counsel approving the form and content of this Agreement by signature hereon enters an appearance in any such proceeding, counsel will not oppose or do anything inconsistent with such policies and procedures, the terms of this Agreement or any orders pursuant thereto. Any Party may enforce this Agreement against any other Party but this Agreement confers no such enforcement right upon any non-Party hereto.

C. **Non-Crude Oil Cases.** By its terms, this Agreement (except Part V hereof) applies only to Alleged Crude Oil Violations funds. Nothing in this Agreement shall operate to the detriment of any Party or claimant in a non-crude oil refund case. The Parties agree that in cases involving (1) both Alleged Crude Oil Violations and other violations resulting in refunds or (2) violations, other than Alleged Crude Oil Violations, resulting in refunds, Alleged Crude Oil Violations funds will not be substituted for funds resulting from other violations or vice versa. OHA will continue to utilize its existing adjudicative policies and procedures as to funds involved in non-crude oil cases, *see, e.g., Office of Special Counsel*, 10 DOE § 85,048 (1982) and *Standard Oil Co. (Indiana)*, 11 DOE § 85,185 (1983), including the selection of an appropriate second stage restitutionary remedy which reflects the geographical incidence of injury, and OHA will not be prevented from freely exercising this discretionary authority in the future.

D. **Ongoing Formula.** This Agreement constitutes the determination of an ongoing formula for the allocation of second stage Alleged Crude Oil Violations funds between DOE and the States. As a result of this Agreement, the parties now believe there is no need for legislation regarding the disposition of such funds, including legislation that may have been proposed in the past. This Agreement is subject to applicable law.

E. **Standing.** Nothing in this Agreement shall confer, diminish or alter, as a matter of law, the rights of a Party to intervention or standing in any pending or future judicial or administrative proceeding involving Alleged Crude Oil Violations, in which a Party asserts an interest not inconsistent with, and not based upon, the provisions of this Agreement.

F. **No Prejudice.** In the event that this Agreement does not receive Final Court Approval, it shall be null and void and of no force and effect. If this Agreement fails to receive Final Court Approval, the fact that any Party executed this Agreement or any release provided for herein shall not be used for any purpose to prejudice such Party's position in any pending or future litigation or other proceeding. This Paragraph shall not be operative so long as there is continuing litigation seeking approval of this Agreement or an appeal therefrom. Upon Final Court Approval, this Agreement shall remain effective irrespective of the final action in *Texaco v. DOE*.

G. **Captions**. Captions used herein are for convenience only and shall have no substantive effect.

H. **Counterparts.** This Agreement may be executed in several counterparts which shall all be considered one Agreement.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED THIS AGREEMENT AS OF THE DATE FIRST ABOVE STATED.

Citation
51 FR 27899-01
1986 WL 104786 (F.R.)
(Cite as: 51 FR 27899)

NOTICES

DEPARTMENT OF ENERGY

Statement of Modified Restitutionary Policy in Crude Oil Cases

Monday, August 4, 1986

***27899** AGENCY: Department of Energy.

ACTION: Statement of modified restitutionary policy to be implemented in crude oil cases.

SUMMARY: The Department of Energy (DOE) is announcing an amendment to its policy concerning the exercise of its remedial authority under the Emergency Petroleum Allocation Act (EPAA), as amended, 15 U.S.C. 751 et seq., in crude oil cases. This policy supersedes the policy announced at 50 FR 27400 on July 2, 1985. Under the policy announced today, the DOE will implement special refund proceedings under 10 CFR Part 205, Subpart V (Subpart V) in crude oil cases, as discussed below. The funds in those proceedings will be distributed as follows: Up to 20 percent of the funds will be reserved for the payment of claims of eligible parties, and the balance will be divided between the states, territories and possessions of the United States (States), and the U.S. Treasury, as indirect restitution to unidentified injured parties. This revision of DOE's restitutionary policy will permit members of the public to seek restitution, and provide significant sums to the States and the U.S. Treasury for the benefit of all citizens, and thus better serve the public interest than current policy.

FOR FURTHER INFORMATION CONTACT: Carl A. Corrallo, Solicitor, Economic Regulatory Administration,

RG-40, 1000 Independence Avenue SW, Room 3H-017, Washington, DC. 20585, 202-252-4387.

SUPPLEMENTARY INFORMATION: The DOE issues this policy statement to modify the Statement of Restitutionary Policy concerning the disposition of crude oil violation refund amounts issued on June 21, 1985 (50 FR 27400, July 2, 1985). Under this Modified Statement of Restitutionary Policy, DOE will exercise its remedial authority under the EPAA in crude oil enforcement cases to provide persons claiming to have been injured by crude oil violations the opportunity to prove injury, and to distribute funds in excess of the amount necessary for the satisfaction of such claims to parties in a manner that achieves indirect restitution: One half of these funds will be distributed to the States, in proportion to their relative consumption of refined petroleum products during the period of price controls, and one half will be distributed to the U.S. Treasury.

Background

This Modified Restitutionary Policy Statement (Statement) is issued in conjunction with the approval on July 7, 1986, of the Settlement Agreement (Agreement) dated May 21, 1986, by the District Court for the District of Kansas (Court) in The Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378. The previous Statement of Restitutionary Policy was also issued in conjunction with M.D.L. 378. See 50 FR. 27400.

The history of M.D.L. 378 is best summarized in the Court's Memorandum and order of September 13, 1983:

This action is a consolidation of a number of cases brought by oil producers to enjoin the Federal Energy Administration (FEA), now the Department of Energy (DOE), from enforcing Ruling 1974-29, concerning low production oil wells, commonly called "stripper wells." The Court enjoined

enforcement of the regulations in question, but ordered the oil producers to deposit into escrow the difference between the stripper well price and controlled price of crude oil affected by the injunction. As of October 31, 1982, the escrow fund, including interest, contained over one billion dollars.

The issue of the validity of the regulations and Ruling was finally settled in In re the Department of Energy Stripper Well Exemption Litigation, 690 F. 2d 1375 (Em. App. 1982), cert. denied, [459 U.S. 1127] (1983), in which the Temporary Emergency Court of Appeals (TECA) reversed this Court's decision and upheld the rulings and regulations as valid. TECA remanded this action to this Court with instructions to enter judgment for DOE, which judgment has been entered. The effect of TECA's decision is to declare the funds deposited in escrow to be overcharges recovered due to violations of the petroleum pricing regulations. The remaining task is the appropriate dispensation of the escrowed funds . . . .

578 F. Supp. 586,589.

On September 13, 1983, the Court granted DOE's motion to refer the issue of who may have been injured by the overcharges to the DOE Office of Hearings and Appeals (OHA) to conduct fact-finding concerning who bore the impact of the overcharges at issue in the Stripper Well case. The Court also ordered all parties with claims on the escrow to submit specific proof thereof to OHA. The Court also solicited DOE's view on the proper means of restitution in this case.

On December 30, 1983, OHA published in the Federal Register a public notice concerning the referral decision (48 FR 57608). That notice discussed the background of this litigation, OHA's preliminary views on the question of injury and specifically requested comments on the impact of the overcharges on Entitlements Program participants, direct purchasers of refined products, resellers, and consumers.

OHA received over 100 separate comments, including comments from many entities or groups which were not then parties to M.D.L. 378.

On May 9, 1984, OHA published another public notice in the Federal Register, announcing its decision to hold an evidentiary hearing on the issue of tracing the impact of the overcharges on direct purchasers of this crude oil and on participants in the Entitlements Program (49 FR 19718). A full twenty-two days of hearings followed during a three-month period. Sixty-four public and private entities and groups consisting of thousands of members participated actively in the hearings. Over thirty witnesses testified and a record of almost 13,000 pages of written and oral presentations was compiled, including 185 exhibits and 23 briefs. Expert witnesses testified as to the effect of oil overcharges upon the consuming public. Econometric evidence (economic studies relying on mathematical and statistical methods) was introduced regarding the specific ***27900** injury to the various parties in the economic chain from producer to consumer.

On June 21, 1985, the first part of the report was submitted to the Court by OHA. Report of the Office of Hearings and Appeals, In Re: The Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D. Kan.) (OHA Report). Based on the expert testimony and evidence presented, OHA determined that it was impossible to trace those increased costs through an individual refiner's refining, distribution and marketing operations. However, based on the econometric evidence presented to it, OHA found that refiners were injured, as a class, by 2.7 to 8.1 percent of the overcharges because of their purchases of crude oil, and that the balance of the overcharges were passed on to subsequent purchasers of refined products. Thus, while downstream customers bore, in the aggregate, between 91.9

and 97.3 percent of the overcharge, the injury to individual consumers could not be accurately determined.

On June 21, 1985, DOE submitted to the Court the second part of its report in the form of a Statement of Restitutionary Policy applicable to all crude oil overcharge, funds. That policy statement, and an implementing order by OHA, were published in the Federal Register on July 2, 1985. 50 FR 27400 and 27402. In the policy statement, DOE announced that, in light of OHA's findings, it would be DOE policy to retain all funds received in crude oil cases in escrow pending Congressional action, and that, if Congress did not act by the end of the current session, i.e., Fall 1986, the funds would be paid to the U.S. Treasury. Thereafter, Judge Theis presented the parties the opportunity to file statements in opposition to the OHA Report.

It was in that context that the parties discussed the settlement of the issue of the disposition of the Court's escrow. In view of the similarity of restitutionary problems confronting the agency in other crude oil cases, and the uniform treatment of all such cases in the policy statement, DOE concluded that the settlement negotiations provided an appropriate vehicle for exploring the resolution of those issues in all crude oil cases.

The Court and OHA had allowed wide-spread participation on the question of disposition of the escrowed funds, and had compiled an extensive record based on the submissions of the parties. The private parties represented the interests of refiners, marketers and major consumers of petroleum products, i.e., Resellers, Retailers, Airlines, Agricultural Cooperatives, Surface Transporters (Trucks, Buses and Cabs), and Utilities. The public parties, the States and DOE, which have been the beneficiaries of indirect restitution in other crude oil cases, also played very active roles. Thus, the parties possessed the necessary expertise and a broad range of interests to assure that the private interests,

and the pubic interest, were recognized.

The Settlement Agreement in the Stripper Well case, which preceded this Policy Statement, was the result of seven months of extensive arms-length negotiations among the various public and private interests to determine an appropriate distribution of the funds escrowed by the Court. In arriving at a compromise, every aspect of the receipt and distribution of the funds by each of these parties was thoroughly debated and subsequently approved by the Court. The negotiations took into account the expected recovery of future funds by DOE in the Stripper Well and other crude oil cases in fashioning the distribution of funds in the Court's escrow, and examined the anticipated benefits to refiners, marketers and other purchasers including consumers. The Parties reached a settlement and presented their Agreement to the Court on May 22, 1986. On July 7, the Court approved the Settlement Agreement, holding that the Agreement "is fair, reasonable and adequate to all concerned parties" (Slip Op. at 19) and that "the agreement promotes the public interest in a very broad sense." (Slip Op. at 25). The Court directed entry of final judgment with regard to "each and every matter that is compromised, settled or otherwise resolved by the Settlement Agreement, as modified by the Court's opinion and order dated July 7, 1986."

The Agreement, as modified by the judgment, resolves a number of matters. Among them are the distribution of funds collected by the Court, and the distribution of funds collected by DOE in other cases. As to the distribution of funds subject to the Court's jurisdiction in M.D.L. 378, the Agreement establishes a mechanism through individual escrow agreements for each of the groups receiving funds from the Stripper Well escrow, i.e., Resellers of refined product; Retailers of gasoline and diesel fuel; Agricultural Cooperatives; domestic Airlines; oil-fired Utilities; Surface

Transporters (fleet operators of trucks, buses and taxis); and Rail and Water Transporters (railroads and operators of barges and American flag vessels).

Each group will receive a portion of the funds held in escrow by the Court in M.D.L. 378 to distribute further pursuant to the terms of their individual escrow agreements. The amounts each group will receive under the Agreement includes an amount in anticipation of the crude oil violation funds DOE believes it will recover in the future. As a result, as a condition to submitting a claim to a refund from any of the above escrows, all claimants will be required to sign a waiver releasing any claims they may have against all other crude oil funds.

The Agreement also provides a mechanism for resolving the distribution of crude oil overcharges in all other cases. This Statement is part of the implementation of the terms of the Agreement which provides a mechanism for the consideration of claims for restitution by purchasers of petroleum products in other crude oil enforcement cases. It applies to the agency's consideration of claims by purchasers of crude oil or refined petroleum products for restitution from the funds collected in other crude oil cases. It addresses the distribution of crude oil violation funds obtained in cases alleging violations of the regulations governing the first sale of crude oil (10 CFR Part 212, Subpart D), the crude oil reseller regulations (Part 212, Subpart F and L), and the entitlements regulations (10 CFR 211.66, 211.67, 211.69). The identification and adjudication of the violation in such cases is unaffected by this Statement.

It is anticipated that the Settlement Agreement will resolve, by payments from the M.D.L. 378 funds and accompanying waivers, the vast majority of claims of individual purchasers of crude oil or refined petroleum products. The Agreement also provides that any restitutionary

funds not distributed to, or reserved for the claims of, private claimants will be divided between the States and the Federal government, as representatives of the energy consuming public.

Individual Claims for Refund

With respect to individual refund claims, the Agreement provides parties which did not settle or receive funds on M.D.L. 378 the opportunity to present their claims to OHA under the existing OHA Subpart V refund regulations at 10 CFR Part 205. Under the Agreement, OHA will establish an initial reserve fund for these claims of twenty percent of all funds subject to Subpart V proceedings involving alleged crude oil overcharges. The remaining eighty percent will then be divided between the States and the U.S. Treasury, as described below. Accordingly, the policy applicable to crude oil overcharges cases announced on July 2, ***27901** 1985, is modified to permit the utilization of the current Subpart V regulations, without amendment, to allow individuals and firms to apply for refunds.

OHA will conduct special refund proceedings in accordance with the rules and procedures established in 10 CFR Part 205, Subpart V. Applicants that received refunds in M.D.L. 378 may not file applications, since they will have waived this right as a condition of receiving payment from the M.D.L. 378 funds. All applicants for refunds pursuant to the Department's Subpart V regulations must demonstrate injury as a result of any alleged crude oil violations. The requirement of a demonstration of injury is established in OHA precedent. See, e.g., Office of Special Counsel/Tenneco Oil Co., 9 DOE 82,538 at 85,206 (1982). Applicants for refunds may seek to prove injury through the use of econometric evidence of the type submitted to OHA and OHA may use the findings contained in the OHA Report when reviewing claims.

Consistent with OHA precedent in Subpart V proceedings, OHA will not accept applications for refunds on behalf of classes, associations or trade groups. OHA has previously determined that claims by similar groups are inappropriate in the "first stage" claims process in which OHA reviews claims of direct injury, because they amount to proposals for "indirect" restitution, i.e., to distribute the funds attributable to unidentified parties. Standard Oil Company (Indiana)/ Diesel Automobile Association, 11 DOE 85,250 (1984).

Restitutionary Distribution to States and DOE

This Statement also alters the restitutionary policy involving the distribution of crude oil overcharge funds attributable to unidentified injured purchasers. The DOE policy heretofore contemplated Congressional action to distribute escrowed funds. DOE has concluded that where it is impossible to trace the effects of violations in order to make direct restitution to the specific persons injured by them, the overcharge monies should be divided by distributing one-half of such funds to the States and depositing the remaining half in the U.S. Treasury. The allocation among the States will be based on the consumption of refined petroleum products within each State during the period of price controls, September 1973 through January 27, 1981. In addition to the fifty states, the District of Columbia the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa and the Northern Marianas will receive distributions of crude oil finds.

Such an indirect restitutionary plan was suggested by the Stripper Well Court in its 1983 Memorandum and Order. Indeed, the Court remarked that it "believes that the equitable goals of restitution would mandate distribution to the state governments or the federal government for use in programs designed to aid energy consumers." 587 F. Supp. 586, 594.

Further, a distribution of crude oil overcharge funds to the States for indirect restitutionary purposes was upheld last year by the TECA in United States v. Exxon Corp., 773, F.2d. 1240 (Em. App. 1985), cert. den., 106 S. Ct. 892 (1986), reh'g den. 54 U.S.L.W. 3663 (Apr. 7, 1986). TECA found in Exxon that the disbursement to the States for the benefit of injured citizens would be "equitable, and fair, and a reasonable method of compensating the public", where identification of victims is impossible. The Agreement also provides for payments directly to the United States Treasury which will "benefit the public." Payne 22 v. United States, 762 F.2d. 90, 94 (Em. App. 1985). As the Court has stated, a payment to the Treasury will fulfill the restitutionary goal of requiring that judicially determined illegal gains are fully disgorged. 578 F. Supp. at 594.

This policy will be implemented by equally distributing to the States, and to DOE for deposit in the Treasury, eighty percent of all crude oil funds. The remaining twenty percent will be set aside for claims of direct injury. Any balance remaining after the first stage is completed will also be paid to the States and DOE. For all overcharge funds in judicial proceedings where injured persons cannot be readily identified, DOE will recommend to the court that it take action to achieve the distribution of the funds in a manner consistent with this Statement.

Under the terms of the Agreement and the Restitutionary Policy announced today, the States must apply the funds received to benefit the citizens of their States. The States may fund (1) programs approved by OHA in Subpart V proceedings; (2) those programs referenced in the consent order which DOE entered into in 1981 with Standard Oil Company of California (Chevron) (46 FR 52221; October 26, 1981); (3) the types of energy conservation activities set forth in the following legislation:

(a) Part A of the Energy Conservation and Existing Buildings Act of 1976 (relating to weatherization of buildings; 42 U.S.C. 6861 et seq.);

(b) Part D of Title III of the Energy Policy and Conservation Act (relating to primary and supplemental State energy conservation programs; 42 U.S.C. 6321 et seq.);

(c) Part G of Title III of the Energy Policy and Conservation Act (relating to energy conservation for schools and hospitals; 42 U.S.C. 6371 et seq.);

(d) The National Energy Extension Service and Conservation Act (relating to the promotion of conservation by small business and individuals; 42 U.S.C. 7001 et seq.); and

(e) The Low-Income Home Energy Assistance Act of 1981 (relating to assisting the poor with home utility bills; 42 U.S.C. 8621 et seq.); and (4) such other restitutionary programs as may be approved by the District Court in the Stripper Well case or by OHA. All such funds paid to the States (including interest earned on such funds following distribution to the States) must be applied to benefit petroleum consumers in those States. The States must use funds received to supplement funds available under Federal or State law.

The direct participation of the States in the distribution of overcharge funds is one means of providing the consuming public with restitution. Such State involvement assures that the local needs of the various States are more directly and effectively addressed. By according each State broad discretion in selecting the programs that best meet the needs of its particular citizens, the Agreement, and this Statement,

allow the States to benefit various categories of petroleum consumers who may not receive direct refunds under the Agreement. In order to more directly involve consumers, each State will

The States have agreed to consider the specific needs of low-income consumers and to consult with low-income group representatives in formulating plans to expend overcharge funds. Similarly, the States have agreed to provide Indian tribal governments and their citizens within their geographical boundaries an equitable share of benefits from State restitutionary programs and consider the unique requirements of the various tribal groups in reviewing their grant application. Finally, the Governor of each state will provide a Letter of Assurance to the Court and to the DOE that all overcharge funds will be ***27902** expended solely in accordance with the Agreement and the terms outlined above.

Funds Affected

As indicated above, the policy announced here is a result of the Court's judgment approving the distribution of funds in the Stripper Well Litigation pursuant to the Settlement Agreement. The funds escrowed in that case will be distributed pursuant to other provisions of the Settlement Agreement which was approved by Judge Theis on July 7, 1986. The mechanism for distribution in the Settlement Agreements consists of individual escrow agreements for each of the groups receiving funds from the Stripper Well escrow. Each individual escrow provides for the disbursement of the funds received to members of that group through a claims fund. Each of the Escrow Agreements established under the Settlement Agreement provided for an Administrator. The Administrator is required to provide notice to members of the eligible group of the applicable procedures for filing a claim and instructions on where to obtain a claim form. At the present time, DOE is also holding monies in escrow obtained

from other crude oil cases. This Modified Restitutionary Policy Statement will immediately apply to distribution of those funds through the implementation of, or completion of pending, Subpart V proceedings. In light of the releases, waiving and releasing any claims to future crude oil funds, executed by the number of parties participating under the Agreement, it is anticipated that relatively few claims will be submitted in the remaining proceedings. Accordingly, as already noted, DOE will reserve at amount of the funds received in crude oil cases for the satisfaction of direct claims and distribute the balance to the States and DOE. At the outset, DOE will reserve twenty percent of the funds received for direct claims, and will reevaluate that amount based on OHA's experience in receiving claims under this policy. Thus, as funds are received in future cases, DOE may distribute a greater portion of the funds received immediately to the States and DOE.

Conclusion

The policy announced today, in conjunction with the Settlement Agreement in the Stripper Well case, is expected to result in the expeditious consideration of claims in crude oil cases, the reduction of challenges to the distribution of funds in such cases, and a reduction of the litigation that has surrounded this issue in the past. Claimants who may not have had the opportunity to recover funds under the Settlement Agreement may file claims in OHA's Subpart V proceedings, and residual funds will be made available immediately to benefit the citizens of the States and the United States.

This policy is effective immediately and will apply to all funds held in escrow in pending crude oil cases as well as to future receipts of funds in such cases.

Issued in Washington, DC, July 28, 1986:

Joseph F. Salgado,

Under Secretary of Energy.

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END OF DOCUMENT

Citation
52 FR 11737-02
1987 WL 129856 (F.R.)
(Cite as: 52 FR 11737)

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Implementation of Special Refund Procedures

Friday, April 10, 1987

***11737** AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice explaining procedures for processing refund applications in crude oil refund proceedings under 10 CFR Part 205, Subpart V.

SUMMARY: This notice considers the comments received by the Office of Hearings and Appeals (OHA) in response to its August 8, 1986 order implementing the Department of Energy's modified policy for restitution of crude oil overcharges, notice of which was published in 51 FR 29689 (August 20, 1986). DOE's new policy was issued in connection with the settlement of the DOE Stripper Well Exemption Litigation, MDL No. 378 (D. Kan.). The policy specifies that 20 percent of crude oil overcharges will be set aside to satisfy refund claims and 80 percent will be disbursed to the state and federal governments for indirect restitution. This notice analyzes the comments and explains the procedures which the OHA will follow in processing applications filed under the DOE's Subpart V regulations for refunds of the crude oil overcharge funds.

FOR FURTHER INFORMATION CONTACT: Thomas 0. Mann, Deputy Director, Roger Klurfeld, Assistant Director, Office of Hearings and Appeals, 1000 Independence Avenue,

SW., Washington, DC 20585, (202) 586-2094 (Mann); (202) 586-2383 (Klurfeld).

SUPPLEMENTARY INFORMATION: As part of the settlement approved in the Department of Energy Stripper Well Exemption Litigation, MDL No. 378 (D. Kan.), the DOE agreed to revise its restitutionary policy for crude oil overcharge cases. Accordingly, the DOE issued a Statement of Modified Restitutionary Policy in Crude Oil Cases on July 28, 1986. 51 FR 27899 (August 4, 1986) (hereinafter referred to as the "MSRP"). The MSRP announces a refund process for restitution of crude oil overcharges using the special refund procedures codified at 10 CFR Part 205, Subpart V. DOE will reserve initially 20 percent of crude oil overcharge funds to satisfy claims and disburse 80 percent of the funds to the State and Federal governments for indirect restitution. The DOE's Office of Hearings and Appeals (OHA) will accept and process refund applications from persons who can show they were injured by crude oil overcharges. After all valid claims are paid, unclaimed funds will be divided equally between the State and Federal governments. The Federal government's share of the unclaimed funds will be deposited into the general fund of the Treasury of the United States.

On August 8, 1986, the OHA issued an order announcing its intention to apply DOE's modified policy in all present and future Subpart V proceedings involving alleged crude oil violations. Refund proceedings then pending before the OHA to which the MSRP applies were listed in the Appendix to the order. Notice of the August 8 order was published at 51 FR 29689 (August 20, 1986). The order provided a period of 30 days for the filing of any objections to the application of the MSRP, and solicited comments concerning appropriate procedures to follow in processing refund applications in crude oil refund proceedings. In addition, the order stated that Applications for Refund may

now be filed, and noted that it is not necessary to file applications in each of the refund proceedings listed in the Appendix.

The August 8 order summarized the OHA's preliminary view of the type of refund process and procedures that would be appropriate in the crude oil cases:

We expect that many potential claimants in the oil industry itself--refiners, resellers ***11738** and retailers--will waive their claims for crude oil refunds in Subpart V proceedings and elect instead to take refunds under one of the escrow funds established under the settlement. In addition, most members of certain groups of petroleum product consumers who are participating in the settlement can also be expected to waive their Subpart V rights: surface transporters (buses, trucks and taxis), water transporters, railroads, airlines and oil burning electric utilities. However, other large consumers of petroleum products that are not covered by one of the escrow accounts established under the settlement are now in a position to file claims. It is likely on the basis of existing OHA precedent in the refund area that refunds made to successful claimants will be calculated according to a volumetric method, in which the amount of money available will be appropriated over all gallons of produce sold. See 48 FR 57608 (1983). It is also likely that small consumers will not receive refunds, since any refunds they receive will be smaller than the cost of processing their applications. We seek comments on the appropriateness of applying these precedents in crude oil refund proceedings.

51 FR at 29691.

The present notice considers the comments which the OHA received in response to the August 20 notice, and provides further guidance to assist claimants who wish to file refund applications for crude oil moneys under the Subpart V regulations.

I. Background

Before considering the comments, this notice provides a general background discussion. The DOE uses Subpart V proceedings to make refunds of oil overcharge funds to injured persons. See 44 FR 8566 (February 9, 1979). In the crude oil area, early Subpart V decisions permitted injured persons to file claims, and proposed to devide the remaining crude oil overcharge funds among the states, based on their proportionate consumption of refined petroleum products. Office of Enforcement, 9 DOE 82,521 (1982) (Alkek); see also Office of Enforcement, 9 DOE 82,553 (1982) (Adams); Office of Special Counsel, 10 DOE 85,048 (1982) (Amoco); A. Johnson & Co., Inc. 12 DOE 85,102 (1984) (A. Johnson). Although more than 60 claims were initially filed (mostly by refiners) in these early cases, major policy questions were unresolved, and these claims were not decided by OHA before the recent crude oil settlement. On September 13, 1983, the United States District Court in Kansas referred the question of who was injured and in what amounts by the crude oil overcharges in the Stripper Well proceeding to the OHA for fact-finding. The court also solicited DOE's view on the proper means of restitution in the case. 578 F. Supp. 586 (D. Kan. 1983). In its decision to refer the matter to OHA, the court observed that although each party had a strong opinion on what remedy was best, there were no facts in the record on which to base a decision. 578 F. Supp. at 595.

After announcing procedures and some tentative conclusions, OHA held an evidentiary hearing over a 22-day period between June and October 1984. Sixty-four public and private entities participated in the evidentiary proceedings. The OHA accumulated a record of nearly 13,000 pages of written and oral testimony.

On June 21, 1985, the OHA submitted its fact-finding report to the court. Report of the Office of Hearings and

Appeals, In Re: The Department of Energy Stripper Well Exemption Litigation, Fed. Energy Guidelines 90,507 (June 19, 1985). The OHA Report concluded that it was generally impossible to trace the overcharges through any particular refiner's marketing system, and no methodology had been suggested which even attempted to accomplish this result. However, using sophisticated econometric techniques, some reasonable assumptions, and evidence in the record showing the movement of refined product prices in relation to crude oil costs over time, OHA was able to arrive at conclusions with a high degree of certainty regarding injury at the refiner level. The OHA determined that domestic refiners as a class absorbed between 2.7 and 8.1 percent of the crude oil overcharges, and that refiners passed on the remainder to the national petroleum distribution network and to consumers (end-users) of petroleum products by increasing the prices of the refined petroleum products which they sold.

DOE also submitted its 1985 crude oil refund policy statement to the court. It recommended that restitution to parties injured by crude oil overcharges should not be attempted, and that the Stripper Well overcharges be placed in escrow and held until the fall of 1986. As a practical matter, DOE's 1985 policy statement placed a moratorium on the processing of claims for restitution which had already been submitted to OHA in crude oil Subpart V cases. As noted in the MSRP:

It was in that context that the parties to MDL 378 discussed the settlement of issues pertaining to the disposition of the court's escrow. In view of the similarity of restitutionary problems confronting the Department in other crude oil cases, and the uniform treatment of all such cases in the 1985 policy statement, DOE concluded that the settlement negotiations provided an appropriate vehicle for exploring the resolution of those issues in all crude oil cases.

51 FR 27899 at 27900 (August 4, 1986).

The settlement which led to DOE's modified restitutionary policy was the result of seven months of extensive negotiations among the various public and private interests to determine an appropriate disposition of crude oil overcharge funds. The scope of the settlement was extremely broad. It applies to the following three different types of crude oil overcharges:

It addresses the distribution of crude oil violation funds obtained in cases alleging violations of the regulations governing the first sale of crude oil (10 CFR Part 212, Subpart D), the crude oil reseller regulations (10 CFR Part 212, Subparts F and L), and the entitlements regulations (10 CFR 211.66, 211.67, 211.69).

51 FR 27899 at 27900. Moreover, it considered the interests of all potential crude oil claimants: Those who were parties to the court case, MDL 378, and others who were injured by crude oil overcharges. Finally, it applies to crude oil moneys in the MDL 378 escrow, to crude oil moneys now in the DOE escrow, and to crude oil moneys obtained in other pending administrative and court proceedings.

For claimants who were parties to MDL 378, the settlement establishes a mechanism through individual escrow accounts for each group to receive a portion of the funds from the Stripper Well escrow, including refiners, resellers of refined petroleum products, retailers of gasoline and diesel fuel, agricultural cooperatives, domestic airlines, investor-owned utilities, surface transporters (fleet operators of trucks, buses and taxis), and rail and water transporters (railroads and operators of barges and American flag vessels). While the amounts each group will receive under the settlement were arrived at through negotiations, they were based on the sum of crude oil violation funds already collected plus the amount DOE believes it will recover in the future.

For purposes of the settlement that total amount was estimated to be $4 billion. Consequently, as a condition to submitting a claim for a refund from any of these escrows, claimants are required to sign a waiver releasing any claims they might have against all other crude oil overcharge funds. The settlement also provides a mechanism--implemented in DOE's MSRP--for other claimants to file for a refund from crude oil overcharges. Under the MSRP, those other persons will be allowed to submit refund claims ***11739** to the OHA under Subpart V, and they will be paid from funds collected by the Department in crude oil cases other than MDL 378. OHA will establish an initial reserve fund for these claims of up to 20 percent of all crude oil overcharge funds subject to Subpart V proceedings. The remaining 80 percent, and any unclaimed funds, will be divided between the State and Federal governments as representatives of the energy-consuming public.

II. Discussion of Comments Received

A. Introduction

In response to our publication of the August 8, 1986 order implementing the MSRP in the Federal Register, 51 FR 29689 (Aug. 20, 1986), the Office of Hearings and Appeals received eleven comments. Those submitting comments were: Farmers Union Central Exchange, Inc. (CENEX); the Transit Authority Refund Claimants Task Force; the American Public Transit Association; the Washington Metropolitan Area Transit Authority; Energy Watch, Inc.; System Fuels Inc.; a group of Ocean Carriers (I); the National Air Transportation Association; Philip P. Kalodner; various States, Territories and Possessions of the United States; and a second group of Ocean Carriers (II).

In general, the comments were brief since it was already made clear in the MSRP and the OHA's August 8, 1986 order implementing the MSRP that the crude oil refund process will

be modeled after the process the OHA has used to evaluate claims based on refined product overcharges in previous Subpart V cases. Indeed, this has been confirmed in decisions issued by OHA since the August 8, 1986 order. As in non-crude oil cases, applicants will be required to document their purchase volumes and to demonstrate that they were injured by the alleged overcharges. The standards for showing injury which the OHA has used in analyzing claims for petroleum product overcharge funds will also apply to claims based on crude oil overcharges. See, e.g., Mountain Fuel Supply Co., 14 DOE 85,475 (1986), citing Dorchester Gas Corp., 14 DOE 85,240 (1986). Refunds to successful claimants will be calculated on the basis of a volumetric refund amount derived by dividing the crude oil overcharge moneys by the total United States consumption of petroleum products during the period of price controls (August 1973 through January 1981).

Next, we will discuss matters addressed in the comments that merit general attention. We will also consider a number of case-specific matters raised by individual commenters. Finally, for general guidance we will summarize the procedures OHA will apply in crude oil refund proceedings under Subpart V.

B. Pre-existing Subpart V Cases

The first area to consider concerns the manner in which the new crude oil restitutionary policy will apply to "pre-existing" crude oil Subpart V cases. This group consists of over 300 individual refund proceedings, including three large consolidated decisions (Adams, Alkek and A. Johnson) and the crude oil portions of "global" settlements (such as Amoco). These proceedings were announced several years before the settlement and the MSRP. The claims period in those cases has long since expired. However, as Ocean Carriers I have pointed out, no claims have yet been paid

pursuant to those Subpart V procedures because of "major uncertainties as to DOE's policy for making refunds." Ocean Carriers I Comment at 4. They maintain that those proceedings should be reopened because of the fundamental change in DOE's crude oil refund policy reflected in the MSRP. Many consumers, including the Ocean Carriers, did not file individual claims in these proceedings, and in light of DOE's stated policy not to accept claims, it would have made little sense for them to do so. Ocean Carriers I Comment at 5. The States take the opposite position, contending that the early Subpart V crude oil cases should not be reopened for new claims, and that all moneys attributable to those cases be immediately paid out to the states and federal government as unclaimed funds. States Comment at 4. We agree that these cases should be reopened. The purpose of these Subpart V proceedings has always been to make equitable restitution to persons injured by crude oil overcharges, see 44 FR 8566 (February 9, 1979), and the OHA has authority under the governing regulations to issue ancillary orders to ensure that restitution is achieved. 10 CFR 205.288. That purpose should not now be frustrated by foreclosing direct restitution in these proceedings solely because of the passage of time Moreover, the period for end-users to file claims in these proceedings was never formally "opened." See, e.g., Alfred B. Alkek, 9 DOE 82,521, at 85,136; see also Adams Resources and Energy, Inc., 9 DOE 82,553; Amoco Brand Committee, 10 DOE 82,556. OHA will therefore issue supplemental orders reopening the claims process in these proceedings. Notice of these actions will be published in the Federal Register.

C. Size of Reserve and Timing of Payments

In a related area, a number of commenters expressed opinions on the size of the reserve which the OHA should maintain for the payment of crude oil refund claims. Comments from potential claimants urged OHA to reserve

more than 20 percent of the funds to avoid a possible shortfall in the amount required for payments to injured persons. However, the settlement permits only downward adjustment of the reserve from the initial 20 percent figure. The States advocated that less than 20 percent of the crude oil Subpart V funds be reserved for claimants. Since the OHA has had no experience in the crude oil refund area since the issuance of the MSRP, we believe that any action to adjust the reserve at this time would be premature.

We have also received comments that addressed the timing of payments under the Subpart V process, both to applicants and to state and federal governments. Commenters who represent potential applicants urge OHA to consolidate all crude oil refunds into one lump sum payment. The States press for immediate distribution of all moneys representing refunds to the states for indirect restitution. It is too early in the Subpart V process for the OHA to be able to make any definitive statements about the timing of refunds. It is clear that we are faced with a "rolling" process in which moneys will flow into and out of the escrow account as settlements are made and refunds determined. OHA will adhere to the Subpart V regulations which govern this process in order to give reasonable notice to the public of proposed refund procedures and to allow for the submission of applications for refund. Amounts not reserved for claims will be distributed promptly to State and Federal governments.

D. Calculation of Refunds

The next matter concerns the calculation of refund amounts in crude oil cases. [FN1] The August 8, 1986 order ***11740** contemplated using a volumetric method for allocating the overcharges among each gallon of refined petroleum products sold in the United States during the period of federal price controls. That allocation would be made by dividing crude oil overcharge moneys ("the numerator") by the total

U.S. consumption of petroleum products during the period of price controls ("the denominator"). 51 FR at 29691. See Mountain Fuel, 14 DOE 85,475 (1986); A. Tarricone, Inc., Case No. KEF-0049 (proposed decision, September 23, 1986). Comments generally supported the volumetric approach, and because of its virtues we have determined that it should be followed in these cases. The volumetric approach presumes that alleged crude oil violations were spread equally and therefore increased the price of all gallons of petroleum products, rather than attempting to tie violations to any specific transactions. In fact, nearly all of the funds involved in these proceedings were obtained through consent orders in which no actual violations were conceded. Moreover, during the period of price controls the Entitlements Program widely dispersed the impact of crude oil overcharges among domestic refiners, and caused the market price of all petroleum products to increase. See generally OHA Report. For these reasons, the volumetric method offers the fairest and most reasonable method for apportioning the crude oil overcharges involved over the products sold in the United States during the period of controls. The volumetric approach is also efficient, having been used by the OHA in hundreds of prior Subpart V refund proceedings involving refined petroleum products, and we conclude that it is equally suited for the crude oil area.

FN1 It should be noted that the method of calculating refunds relates only to the fair allocation of funds in the reserve to claimants to make restitution for the injury they suffered. Cf. Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, section 3003(b) (Subpart V proceedings should establish the amount of injury claimants experienced from oil overcharges). This discussion has nothing to do with the amount of money that is reserved to pay claims, which was discussed at a previous point in this notice.

Both groups of Ocean Carriers maintained that the volumetric calculation should be modified in certain respects. First, Ocean Carriers I claimed that the denominator used by DOE in the cases cited above was inflated because it included petroleum consumption for the entire years 1973 and 1981. This is not correct. As we stated in Mountain Fuel, the denominator is "an estimate of the number of gallons of petroleum products consumed in the United States during the period August 1973 through January 1981 (2,020,997,335,000)." 14 DOE at 88,868 n.4 (emphasis added). Second Ocean Carriers I and II contended that "the only fair way to calculate the volumetric refund amount is to include in the numerator all monies attributable to crude oil overcharges, including the Stripper Well monies." Ocean Carriers I Comment at 9; see also Ocean Carriers II Comment at 10. [FN2] They reasoned that since the denominator includes all refined products, and therefore crude oil, consumed in the United States during the period, it would be inconsistent and unfair if the numerator did not reflect all crude oil overcharges related to that consumption. The Carriers contend that the claimants in these Subpart V proceedings were injured by the Stripper Well overcharges just as much as by the crude oil overcharges of the many firms listed in the appendix to the August 20, 1986 Federal Register notice. For this reason, they contend that their refunds should take that injury into account. Id.

FN2 The Transit Authority Refund Claimant Task Force makes a similar argument, urging OHA to deduct from the denominator the volumes of refined products sold to the groups of MDL 378 parties for whom specific escrow accounts were established in the settlement. Although this type of adjustment has some appeal, it would be too difficult to implement as a practical matter. All of the volumes that passed through petroleum product resellers and retailers were ultimately consumed by end-users, some of whom may apply

for refunds themselves, and this could produce double or even triple counting of volumes. Because of these difficulties, accurately adjusting the number of gallons in the denominator might delay the crude oil refund process for several years. That result would defeat one of the principal purposes of the settlement: achieving an expeditious resolution of all crude oil refund claims.

For the reasons explained below, we think the Ocean Carriers position has considerable merit on both theoretical and practical grounds. To be equitable, restitution in Subpart V crude oil proceedings should reflect the amount of injury suffered from all crude oil overcharges, regardless of their source. The volumetric method bases the calculation of refunds on an apportionment of crude oil overcharges over each gallon of product consumed in the United States during the period of price controls. These crude oil overcharges had the same general effect--they all caused the market price of each gallon of petroleum products to increase. Since the denominator includes all gallons of products consumed during controls, a fair volumetric apportionment should attempt to include in the numerator all alleged crude oil overcharge moneys received (including those that will be received in the future, assuming a reasonable degree of certainty as to the amount of future recoveries). In fact, this methodology was followed in the Stripper Well settlement, which addressed crude oil violation moneys contained in both the MDL 378 escrow and the DOE escrow, as well as DOE's estimated recovery of additional crude oil overcharges in the future, and provided for a joint resolution of refund claims based on those overcharges. The sum of these amounts--$4 billion--was the starting point for determining how much each group of parties to MDL 378 would receive in the settlement. Refunds to injured persons who were not parties to MDL 378, or non-waiving parties, are paid from the DOE escrow. [FN3] As stated by Judge Theis, the settlement agreement provides "an

opportunity in special refund proceedings pursuant to 10 CFR Subpart V for non-settling [non-l- waiving claimants to submit any claims of injury from an alleged crude oil violation." In Re: The Department of Energy Stripper Well Exemption Litigation, MDL No. 378 (D. Kan., July 7, 1986) (opinion and order approving settlement), skip op. at 13.

FN3 Different groups of claimants are to receive restitution either from the MDL 378 escrow or from another escrow account. Refunds to refiners and members of other groups that were parties to MDL 378 are paid from the MDL 378 escrow.

In order to treat Subpart V claimants on a fair restitutionary basis, the volumetric calculation must recognize that the total amount of all crude oil overcharges (including future recoveries) is much larger than the amount in each specific case made subject to Subpart V proceedings. In fact, use of only the crude oil overcharge amount available in each specific case made subject to Subpart V proceedings results in the smallest possible per-gallon allocation of crude oil overcharges. As discussed below, additional crude oil overcharge amounts can be included in the numerator. These different numerator amounts result in a range of possible volumetric overcharge calculations that could be used in crude oil Subpart V proceedings.

The highest volumetric calculation would include all crude oil overcharges collected and to be collected in the future. For purposes of the settlement negotiations, that amount was estimated to be $4 billion. This number included crude oil overcharge moneys from several sources: (i) The amount then in the DOE escrow; (ii) the amount in the MDL 378 escrow; and (iii) the amount of estimated future recoveries. That figure could even be increased by an additional $2 billion to account for the crude oil overcharges determined in United States v. Exxon Corp., 561 F. Supp. 816

(D.D.C. 1983). Inclusion of the Exxon overcharges would produce a total crude oil overcharge recovery figure of $6 billion and yield the highest volumetric overcharge in the range, approximately $0.003 per gallon of petroleum products purchased.

*11741 Inclusion of the entire $4 billion in total estimated recoveries alone, while excluding the Exxon overcharges, yields an overcharge amount of approximately $0.002 per gallon. This is the second highest figure in the range. The next largest refund formulation would take the $4 billion figure of estimated total recoveries, reduce it by $415 million--the amount being refunded in MDL 378 to firms in the petroleum product distribution chain (refiners, resellers and retailers)--and would yield an overcharge amount of approximately $0.0018 per gallon.

Another approach would be to include the $1.4 billion in the MDL 378 escrow at the time of settlement, minus the $415 million refunded to refiners, resellers and retailers, or $985,000,000, plus the crude oil overcharges that were in DOE's escrow account at the time of the settlement. The sum of these two figures is $1,654,662,389 which yields an initial volumetric overcharge amount of approximately $0.0008 per gallon. Under this formulation, as additional crude oil violation amounts are received in the future the volumetric overcharge amount would be increased. This "full party" approach would eliminate the need to consider any questions of "upstream" overcharge absorption by the refiners, resellers and retailers who supplied products to end-user claimants, since the amount of injury attributed to those intermediaries in the distribution chain is excluded from the numerator. Finally, the lowest possible overcharge allocation in the range would exclude the Stripper Well overcharges entirely and include in the numerator only the amount of crude oil overcharges in the DOE escrow account at the time of the settlement

($669,662,389). This yields a volumetric overcharge of approximately $0.0003 per gallon.

Some of the volumetric formulations in the range described above have evident drawbacks. For example, the circumstances of the Exxon litigation can be distinguished, since the remedy devised by the District Court--refunds to state governments for the benefit of all consumers--was already completed before the Stripper Well settlement was concluded. In contrast, the lowest number (about one-tenth of the largest number in the range) is small in comparison and may not accurately reflect the level of injury suffered by Subpart V claimants. It clearly does not treat Subpart V claimants on a par with parties who received restitution from the MDL 378 escrow, since it would use a different, much smaller number for total crude oil overcharge recoveries. Cf. Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, section 3003(b) (Subpart V proceedings should establish the amount of injury claimants experienced from oil overcharges). Use of the smallest number in the range would also be most likely to produce repetitive claims and the need for administrative reprocessing because claimants would have to reapply for additional refunds as DOE received additional crude oil moneys.

We have concluded that the "full parity" method described above best achieves the restitutionary objectives of the settlement and should be used to calculate the volumetric overcharge amount in crude oil proceedings under Subpart V. This would produce a current volumetric refund amount of $0.0008 per gallon. The "full parity" approach compensates refund recipients in MDL 378 and in Subpart V proceedings on an equal footing and most fairly and equitably effectuates restitution for the injury they suffered as a result of crude oil overcharges.

It is also the most administratively efficient for Subpart V proceedings since it tends to eliminate repetitive reapplications and obviates the need to consider nettlesome questions of "upstream" overcharge absorption by middlemen in the oil distribution chain.

E. Standards for Showing Injury

The next area of general interest concerns the standards for showing injury in crude oil refund proceedings under Subpart V. Several commenters advocated the use of the well-established presumption of injury for end-users (ultimate consumers), provided their business was unrelated to the petroleum industry. Others submitted comments that urged OHA to use presumptions of injury for resellers and retailers based on those adopted in various major refiner refund proceedings. A number of comments urged OHA to follow Subpart V precedents and permit claimants to use estimates to establish the number of gallons of petroleum products purchased. Related comments requested guidance on whether it was necessary for applicants to identify their suppliers in order to receive a refund. Finally, the States contend that Paragraph IV.B.1 [FN4] of the Settlement Agreement bans the use of these presumptions in Subpart V proceedings, and requires end-user claimants to submit detailed evidence of injury in order to receive refunds for crude oil overcharges.

FN4 Paragraph IV.B.1 provides as follows:

B. Pending and Future Proceedings. DOE and the States agree:

1. Modification of Policy. In order to carry out its remedial authority under the ESA and EPAA, within 20 days following the date of the Approval Order, DOE will issue a modification of the Statement of Restitutionary Policy concerning Alleged Crude Oil Violations issued on June 21, 1985 (50 FR 27400; July 2, 1985). DOE will publish that

modification (hereinafter the Modified Policy) in the Federal Register. The Modified Policy will state that the policy of DOE is to process applications for refunds pursuant to existing Subpart V regulations and that in such administrative proceedings involving Alleged Crude Oil Violations, OHA will continue to require that each claimant must affirmatively demonstrate that it has been injured by the alleged violation and that is should therefore receive a refund. See e.g. Office of Special Counsel/Tenneco Oil Co., 9 DOE 82,538 at 85,206 (1982). The Modified Policy will state that individuals claiming such injury may file claims but OHA will not accept claims on behalf of classes, associations or trade groups. Nothing in the Modified Policy will preclude a claimant from attempting to prove injury through the use of econometric evidence of the type that was submitted in the Stripper Well evidentiary proceedings before the OHA nor preclude OHA from using the findings contained in the Report of the Office of Hearings and Appeals, In re The Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D. Kan., filed June 21, 1985). Nothing contained herein may be construed to amend the Subpart V regulations.

The OHA intends to apply relevant precedents established in the petroleum product refund area to crude oil Subpart V proceedings. The States are incorrect in claiming that Paragraph IV.B.1 supports the position that no presumptions are to be permitted in crude oil Subpart V proceedings. To the contrary, Paragraph IV.B.1 specifically indicates that the settlement does not amend the Subpart V regulations. Section 205.282(e) of these regulations explicitly provides for the use of appropriate presumptions of injury in any Subpart V claim, and OHA has employed presumptions in thousands of refund cases since 1981. Presumptions are necessary because the Department's primary restitutionary policy is to pay injured persons, i.e. to do direct restitution. To achieve this, refund procedures must take account of the

complexity of oil overcharge proceedings, difficulty in actually proving an overcharge, passage of time, difficulties in locating records and relevant market data, and the agency's expertise in the structure of the industry and its functioning during the period of controls. The Settlement Agreement itself took account of these factors and did not require any party to the Stripper Well Litigation to provide proof of injury in order to receive a refund. The settlement specified that there shall be a Subpart V claims process for injured persons who were not parties to the Stripper Well Litigation. The imposition of new standards for proof of injury *11742 would be inconsistent with this provision.

The Tenneco decision cited in the settlement established procedures for distributing funds remitted by the firm pursuant to a DOE consent order. The Tenneco refund procedures incorporated several different kinds of presumptions. For example, firms that had already received refunds directly from Tenneco were presumed to be ineligible for further refunds from OHA. 9 DOE 82,538 at 85,201. Spot purchasers of Tenneco products were also presumed to be ineligible for refunds under Subpart V. Id. End users were not required to show they absorbed any overcharges in order to receive a refund. 9 DOE 82,538 at 85,202. Under the Tenneco standard an end-user had only to prove its volume of purchases from Tenneco in order to establish injury and receive a refund. See, e.g., Tenneco Oil Co./Defense Logistics Agency, 9 DOE 82,588 (1982). This is the same standard that OHA will apply in deciding crude oil refund claims submitted by end-users under Subpart V. The States' position confuses the requirement of showing absorption of overcharges, which was applied to refiners and resellers in adjudicating refund claims under Subpart V for refined petroleum product overcharges, with the different standard applied in those proceedings to end-users. Refiners and resellers (unlike end-users of refined petroleum products) had the opportunity

under DOE statutes and regulations to pass through overcharges in the prices of the same products resold within the same regulated industry. Far from supporting the States' position, the page of the Tenneco decision cited in the Settlement Agreement does not relate at all to end-user claimants, but deals instead with Entitlements Program participants, i.e. refiners, and allocation claimants. [FN5] Id. at 85,206. Thus, the language on which the States rely is irrelevant to the treatment of end-user claimants. Id.

FN5 In fact, the page of the Tenneco decision cited in the Settlement Agreement specifically provides that allocation claimants "need not conclusively establish all of the elements of a violation on Tenneco's part and resulting injury on the claimant's part." 9 DOE at 85,206. Instead, "an applicant should submit enough information to demonstrate that its claim is not spurious, including the best available evidence of the injury which was sustained by the claimant." Id.

The States' position is insupportable as a matter of common sense as well. Under the presumptions we are adopting for crude oil refunds, end-users (ultimate consumers) whose businesses are unrelated to the petroleum industry need establish only the volume of petroleum products they purchased during the controls period to prove that they were injured by crude oil overcharges; they do not have to submit any further evidence to prove that they absorbed the overcharges. This policy furthers important practical goals. Analysis of the impact of crude oil overcharges on end-users is beyond the scope of a refund proceeding. See Office of Enforcement: In the Matter of PVM Oil Associates, Inc., 10 DOE 85,072 (1983) at 88,308. End-users generally were not subject to price controls and were not required to keep records which justified selling price increases by reference to cost increases. If, for example, a brick manufacturer filed a claim for a refund on the fuel oil it purchased during the period

August 1973 through January 1981, it is only reasonable to conclude that the firm was harmed by the amount of the crude oil overcharges allocated to the fuel oil which it used to manufacture bricks. Performing an economic analysis of the effect of the overcharges on the price of bricks would be duplicative. [FN6] Using the approach advocated by the States would be costly and inefficient and would mean that virtually no end-users would receive restitution for the crude oil overcharges they suffered. See Greater Richmond Transit Co., 15 DOE 85,028 at 88,050.

FN6 By contrast, petroleum refiners and resellers had the opportunity under DOE statutes and regulations to pass through increased costs of refined petroleum products by raising the prices of the very same products that they charged to their customers. Since regulated firms in the petroleum industry were required to keep records showing how their cost increases justified price increases, OHA has generally examined the question of absorption versus passthrough when considering large refund applications submitted by these firms.

This standard for end-users has recently been described in a shorthand fashion as a "presumption of injury," but its use was based on the practical considerations noted above, a factor also underlying the standard for proving injury from antitrust violations (courts do not attempt to determine whether first purchasers were able to "pass on" the effects of the violation). [FN7] See Additional Comments of Philip P. Kalodner at 5-20, summarizing the development of OHA caselaw regarding refunds to end-user claimants. All of the presumptions we are adopting are rebuttable, and any interested party can submit evidence to show that a refund applicant in fact was able to pass on the crude oil overcharges or is not otherwise eligible to receive the refund which it seeks.

FN7 See Hanover Shoe, Inc. v. United Machine Corp., 392 U.S. 481 (1968); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). This approach to end-user claims has also been applied to private enforcement actions brought under section 210 of the Economic Stabilization Act. Eastern Airlines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 (Temp. Emer. Ct. App. 1979). Three matters mentioned above deserve further discussion. The first question is whether applicants must identify their suppliers and prove their exact gallonage to receive refunds. In view of the finding in the OHA Report that crude oil overcharges increased the prices to consumers of all domestic petroleum products, applicants need not identify their suppliers in order to receive refunds. OHA Report, Fed. Energy Guidelines 90,507 at 90,620. For purposes of these crude oil overcharge proceedings, it matters only that the applicant purchased petroleum products in the United States market during the period August 1973 through January 1981. Following OHA precedent, reasonable estimates of purchase volumes will be permitted.

The second question is whether the presumptions of injury for resellers and retailers used in recent refined product Subpart V cases, such as Marathon Petroleum Co., 14 DOE 85,269 (1986), should be permitted in crude oil refund proceedings. See, e.g., Energy Watch Comment. These presumptions will not apply here. Applicants for crude oil refunds must show injury. 51 FR at 27901. There is an important distinction between product refund cases under Subpart V and crude oil cases which is particularly relevant to this issue. In a case like Marathon, in which refunds are made for alleged overcharges in sales of refined products, the overcharges were confined to purchasers of Marathon products, and the presumptions of injury for Marathon resellers reflect this fact. By contrast, market prices for refined products generally increased when crude oil

overcharges occurred, and all resellers--regardless of their suppliers--were therefore affected by crude oil overcharges.

Accordingly, a reseller or retailer must submit additional evidence to show the extent to which it absorbed crude oil overcharges. Under the circumstances, resellers and retailers will not be permitted to use presumptions to show they were injured in crude oil refund cases. These classes of applicants may, however, use the type of econometric evidence that was submitted to OHA in the Stripper Well proceeding to show that they were injured by crude oil overcharges. 51 FR at 27901; Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, section 3003(b)(2).

Finally, we should note that utilities have been permitted to receive refunds in Subpart V refund proceedings only to ***11743** the extent that they notify the applicable state regulatory body and pass on the entirety of the refund to their retail customers. For example, in A. Tarricane, Inc./Consolidated Edison Company of New York, Inc., 15 DOE 85,038 (1986), the utility received a refund based upon its purchases of product after it had certified "that as a regulated utility it will notify [the state utility commission] of any refund received and will also pass such refund on to its retail customers on a dollar for dollar basis." 15 DOE at 88,074. To receive a refund in any crude oil refund proceeding, a regulated utility will have to submit a similar certification.

F. Case-Specific Comments

We will next direct our attention to two case-specific comments that were received in response to the August 20, 1986 Federal Register notice. The first of these comments was submitted by CENEX, and the second was submitted by the National Air Transportation Association (NATA).

CENEX is a large regional agricultural cooperative headquartered in St. Paul, Minnesota, whose members include local cooperatives located throughout the northern tier states. One of the Subpart V crude oil cases, No. HEF-0359, involves an April 1981 consent order between CENEX and DOE which settled in alleged $0.13 per barrel posted price violation by the cooperative for $150,000.

Refund procedures for the CENEX consent order were established in A. Johnson, 12 DOE 85,102 (1984), and the funds will be subject to claims under the MSRP. CENEX claims that consolidating the CENEX consent order funds with all other crude oil moneys in DOE's escrow is improper since the oil was used by its refineries, and any overcharges from the posted price violation were not dispersed by the Entitlements Program, but borne exclusively by its member cooperatives. CENEX asserts that despite the waivers it has executed to receive MDL 378 refunds (both as a refiner and a cooperative) which released all claims against crude oil moneys subject to Subpart V, its members were the only one injured by its posted price violations, and it should be allowed to filed a claim for crude oil refunds.

We do not believe that the position taken by CENEX is correct; however, we will not in this notice make a final determination on any claim. As a party to MDL 378, CENEX agreed to the consolidation of all types of alleged crude oil violations for purposes of the settlement and the MSRP, even though it knew or should have known that the funds in OHA Case No. HEF-0359 would be subject to general claims, rather than refunded exclusively to its members. See 51 FR at 27900 (settlement "addresses the distribution of crude oil violation funds obtained in cases alleging violations of the regulations governing the first sale of crude oil . . . . "). In our view, CENEX must live with the consequences of its participation in the settlement negotiations. The releases which it must

execute to receive refunds from the MDL 378 escrows clearly indicate that the firm waives its Subpart V claims. CENEX (and any of its members) may nevertheless file claims for portions of the Subpart V crude oil moneys, and we will consider their arguments in detail at that time. It should be obvious from the foregoing, however, that CENEX and its members have a substantial burden to prove that they should receive crude oil refunds under Subpart V. The NATA is a national trade association representing the resellers of aviation fuels known as "fixed base operators." According to NATA, most of its members are planning to take refunds from MDL funds through the resellers escrow, and they will be required to waive their claims against the Subpart V moneys. However, NATA points out that some of its members also operate flight schools and air taxis in which they are end-users of aviation fuel. NATA's comment asked OHA to advise it whether its "dual purchaser" members waive their right to file for Subpart V refunds if they obtain an MDL 378 refund from the resellers escrow. It seems clear that the NATA resellers which elect to file for resellers escrow refunds waive their rights to file for Subpart V refunds as end-users, based on the language of the Resellers Notice of Settlement and the actual text of the resellers waiver and withdrawal of claims provisions in the Settlement Agreement at Exhibit B. Moreover, this position was also stated by former ERA Solicitor Carl A. Corrallo in the June 12, 1986 hearing on the settlement before Judge Theis. See Transcript of June 12, 1986 Hearing, MDL No. 378 (D. Kan.) at 23-34. Likewise, in the July 7, 1986 order approving the settlement, Judge Theis indicated the court's view that "all parties and claimants receiving funds under the agreement will waive any further claims to crude oil refunds." In Re: The Department of Energy Stripper Well Exemption Litigation, MDL No. 378 (D. Kan., Jul. 7, 1986) (opinion and order approving settlement), slip op. at 13. The court also stated that the claims procedures established for the various

MDL 378 escrows adequately compensated parties for the claims they waived. Id. at 22. As noted above, the MSRP and the OHA's August 8, 1986 order implementing the MSRP also state that MDL 378 parties who execute waivers cannot also apply for refunds under Subpart V.

III. Summary of Crude Oil Refund Procedures

The guidelines which follow provide a general summary of the standards which the OHA will apply in crude oil refund proceedings, under Subpart V. It should be recognized, however, that under those regulations, standards and procedures governing the evaluation of refund claims must be contained in a final Decision and Order issued pursuant to 10 CFR 205.282(c) and published in the Federal Register. All Subpart V refund proceedings involving alleged crude oil violations where the claims deadlines have expired before issuance of the MSRP will be reopened for claims by issuance of appropriate orders in the near future. All cases involving alleged crude oil violations where a Proposed Decision and Order establishing procedures has been issued will be finalized pursuant to s 205.282(c). It is likely that funds from many different cases will be consolidated to maximize the administrative efficiency of the process. See, e.g., A. Tarricone, Inc., Fed. Energy Guidelines 90,060 (proposed decision, September 23, 1986) (consolidation of 28 cases). OHA will accept and process refund applications from persons who claim they were injured by alleged crude oil violations. Because the process is new, adequate notice to the public of the opportunity to submit claims is important. 10 CFR 205.283(b). Although no deadline will be established in this notice for the submission of claims or the payment of refunds, final Decisions and Orders in these cases will set deadlines for the submission of refund applications. Amounts not reserved for the payment of claims will be distributed to State and Federal governments.

As in non-crude oil cases, applicants will be required to document their purchase volumes and demonstrate that they were injured. See Mountain Fuel Supply Co., 14 DOE 85,474 (1986). Following Subpart V precedent, reasonable estimates of purchase volumes may be submitted. Greater Richmond Transit Co., 15 DOE 85,028 (1986). Applicants who were end-users (ultimate consumers) of petroleum products whose businesses are unrelated to the petroleum industry and who were not subject to the DOE price regulations are presumed to have absorbed rather than passed on alleged ***11744** crude oil overcharges, and need not submit any further evidence of injury beyond volumes of product purchased in order to receive a refund. Id. It is not necessary for applicants to identify their supplier of petroleum products in order to receive a refund. Resellers and retailers of petroleum products must submit detailed evidence of injury, and may not use presumptions of injury established by OHA in refund cases involving refined petroleum products. They can, however, use econometric evidence of the type used in the OHA Report to the District Court in the Stripper Well litigation, MDL No. 378 (D. Kan.), Fed. Energy Guidelines 90,507 (June 19, 1985), and OHA intends to use the Report in evaluating refund applications submitted under Subpart V. Parties to MDL 378 who received refunds from one of the escrows established in the settlement will have waived their rights to apply for crude oil refunds under Subpart V.

Refunds will be calculated using a volumetric method in which the amount of crude oil overcharge funds will be divided by the total United States consumption of refined petroleum products during the period of price controls (August 1973-January 1981). The numerator of this volumetric refund calculation will include the $1.4 billion in the MDL 378 escrow at the time of the settlement, minus the $415 million refunded to refiners, resellers and retailers, or $985 million, plus the crude oil overcharges in DOE's escrow account at the

time of the settlement. As indicated earlier, the latter amount is $669,662,389. The sum of these two figures is $1,654,662,389, which yields an initial volumetric refund of approximately $0.0008 per gallon. This calculation is subject to further adjustment as additional crude oil moneys become available in the DOE escrow and are made subject to the crude oil claims process.

No application forms will be provided. Instead, end-users should submit the material outlined below in the form of a letter. The letter should include the following information: (a) A short description of the applicant's business and use of petroleum products; (b) the total number of gallons of domestic petroleum products used during the period August 19, 1973 through January 27, 1981 broken down by product; (c) an explanation of how the applicant obtained the volume figures above; (d) a statement that the applicant, its parent firm, affiliates, etc., have not elsewhere waived their right to a refund; and (e) if the applicant did business under more than one name or a different name during the period of price controls, a list of the names which it used. Resellers and retailers should submit all of the information outlined above, plus additional evidence to show that the applicant was injured, i.e. that it did not pass all overcharges through to its own customers. The telephone number for a contact person who can answer questions about the application should be provided, and the letter should indicate the name and address of the person who should receive the refund check. The application should be typed or printed, and mailed to the following address:

Subpart V Crude Oil Overcharge Refunds, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. A current taxpayer identification number or Social Security number must also be included in the letter. Applicants may be

required to submit additional information to document their refund claims.

Under the MSRP, up to 20 percent of the alleged crude oil violation amount may be reserved for the payment of claims to injured persons. For the present time, OHA has decided to reserve the entire 20 percent to ensure that adequate funds will be available for refunds. The remaining 80 percent of the funds will be disbursed to state and federal governments for indirect restitution under the formulae governing those disbursements which are specified in the Settlement Agreement. However, those funds are subject to the same reporting requirements as all other crude oil moneys received by the States under the settlement.

Dated: April 6, 1987.

George B. Breznay,

Director, Office of Hearings and Appeals.

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